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THE INF TREATY

REPORT

OF THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

APRIL 14, 1988

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THE INF TREATY

APRIL 14 (legislative day, APRIL 11), 1988.—Ordered to be printed

Mr. PELL, from the Committee on Foreign Relations,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-11]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles together with the Memorandum of Understanding and the two Protocols thereto, collectively referred to as the INF Treaty, all signed at Washington on December 8, 1987, having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof, subject to a condition as set forth in this report and the accompanying resolution of ratification.

I. OBJECT AND PURPOSE

The object and purpose of the INF Treaty is to eliminate all of the two superpowers' existing intermediate-range and shorter-range missiles, as well as the launchers and certain support facilities for those missiles, over a period of three years and to prohibit such missiles and equipment thereafter.

The elimination of such missiles and launchers will reduce by only a small fraction the overall nuclear delivery capability of each side but will remove weapons that each side has regarded as particularly threatening. For the Soviets, U.S. land-based missiles in Europe have been perceived as having a first-strike potential. For the United States, Soviet intermediate-range and shorter-range missiles have been regarded as designed to intimidate Western Europe and to drive a wedge between the United States and its European allies in their perceived collective defense commitments.

All targets covered by the U.S. missiles to be removed can be struck by other U.S. nuclear delivery systems: dual-capable aircraft in the European theater; submarine-launched ballistic missiles under the authority of the NATO Supreme Allied Commander; sea-launched cruise missiles; and the enormous land, sea, and air power of the U.S. strategic triad. Similarly, all European and Asian targets previously covered by Soviet missiles with 500–5,500 kilometer ranges can be hit by Soviet strategic-range systems that could be easily retargeted or, unless a new agreement covering strategic arms is reached, covered by additional strategic deployments. This reality means that the primary significance of the INF Treaty is political rather than military.

For the United States and its allies, this political significance is three-fold:

—First, the Treaty represents a triumph of solidarity for the NATO Alliance, which determined in 1979 to deploy new U.S. Pershing and cruise missiles, beginning in 1983, as a bargaining counter to steadily increasing Soviet power. NATO implemented that decision in the face of considerable public opposition to new nuclear deployments, and the elimination of Soviet land-based missiles designed principally for Western European targets is the direct consequence of that demonstration of cohesion and resolve. For the allies, the principle of bargaining from strength has been vindicated.

—Second, the Treaty should strengthen Western European confidence in the U.S. commitment to the defense of Europe. By eliminating the SS–20's, the Treaty will remove an instrument of intimidation exploited by the Soviet Union to drive a wedge between the United States and its European allies. European fears of "decoupling" which arose in the late 1970's primarily as a result of the introduction of the SS–20 should, therefore, be greatly diminished. At the same time, the security of U.S. allies and friends in Asia will be improved as a result of the elimination of Soviet INF missiles deployed east of the Urals capable of carrying more than 500 warheads. By ensuring that missiles targeted on Asia were covered by the INF Treaty, the United States provided substantial reassurance of its commitment to the security of allies and friends in the region.

—Third, the Treaty represents a potentially significant change in the dynamics of the East-West confrontation. In agreeing to the elimination of intermediate-range and shorter-range missiles, the Soviet leadership accepted two crucial principles—on-site inspection and asymmetrical reductions—that may portend greater Soviet willingness to accommodate NATO concerns in the on-going negotiations on strategic nuclear arms, the talks on improving the stability of the conventional balance in Europe, and the talks on chemical arms. In the aftermath of INF Treaty ratification, the NATO allies will face the challenge of testing these possibilities through the same combination of resolve and creative negotiation that produced the INF result.

II. Treaty Terms

The Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (the INF Treaty) consists of four documents formally transmitted to the Senate by the President on January 25, 1988, for the Senate's advice and consent to ratification: a Treaty of unlimited duration with a preamble and 17 articles, a Memorandum of Understanding (MOU) regarding the establishment of a data base, a Protocol on Elimination governing the elimination of missile systems, and a Protocol on Inspection regarding the conduct of inspections, with an Annex to that Protocol on the privileges and immunities to be accorded inspectors and aircrew members. The Treaty, together with the MOU and the two Protocols, was signed at Washington on December 8, 1987.

The President also transmitted, for the information of the Senate, an Agreement Among the United States of America and the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Italy, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland Regarding Inspections Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (the Basing Country Agreement), which was signed at Brussels on December 11, 1987. The Basing Country Agreement confirms that the inspections called for in the Treaty will be permitted by the five Allied Basing Countries. Also provided were the notes exchanged between both the German Democratic Republic and Czechoslovakia and the United States. The notes acknowledge that these countries agree to the United States' conducting inspections, under the Treaty, on their territory. Identical notes also were exchanged between the Soviet Union and the five Allied Basing Countries.

A. THE TREATY TEXT

Article I of the Treaty sets forth the basic requirement that each Party eliminate its intermediate-range and shorter-range missiles, not have such systems thereafter, and carry out the other obligations set forth in the Treaty.

Article II defines various terms. It specifically defines ground-launched ballistic missiles and ground-launched cruise missiles as missiles that are ground-launched *and* "weapon-delivery" vehicles (See Section VI (D) on the definition of a "weapon-delivery" vehicle). And it specifically defines an intermediate-range missile as a ground-launched ballistic missile or a ground-launched cruise missile having a range capability in excess of 1,000 kilometers but not in excess of 5,500 kilometers. A shorter-range missile is defined in Article II as a ground-launched ballistic missile or a ground-launched cruise missile having a range capability equal to or in excess of 500 kilometers but not in excess of 1,000 kilometers.

Article III defines existing types of intermediate-range missiles as the Pershing II and the BGM-109G for the United States and the RSD-10, the R-12, and the R-14, which are known to the United States as the SS-20, the SS-4, and the SS-5, respectively, for the Soviet Union. Existing types of shorter-range missiles are identified as, for the United States, the Pershing IA, and, for the Soviet Union, the OTR-22 and the OTR-23, which are known to the United States as the SS-12 and SS-23, respectively.

Article IV requires that the Parties eliminate all intermediate-range missiles and launchers and support structures and equipment within three years of entry into force. The reductions are divided into a first phase ending in 29 months and a final phase ending at the three-year mark, when eliminations are to be completed. By the end of the first phase, each side must reduce its deployed launchers to the number capable of carrying missiles with 171 warheads and reduce its deployed missiles to the number carrying 180 warheads. When both deployed and non-deployed launchers and missiles are counted, the totals cannot exceed those of a force capable of carrying 200 warheads.[1] All of the missiles covered by the INF Treaty are considered to have one warhead except for the SS-20. Accordingly, at the end of the first phase, the Soviets could have only one missile and launcher for every three SS-20 warheads counted against the ceiling. Since the United States' GLCM launcher carries four missiles, the United States could have only one launcher for every GLCM warhead and missile counted against the ceiling at the end of the first phase. Article IV also provides that the ratio of deployed and non-deployed intermediate-range ground-launched ballistic missiles to the aggregate total of all deployed and non-deployed intermediate-range missiles at the end of the first phase shall not exceed the ratio of such missiles as of November 1, 1987. This provision will prevent the United States from retaining a disproportionate number of Pershing II missiles in its permitted total at the end of the first phase.

Article V requires that all shorter-range missiles and launchers, as well as support equipment in categories listed in the MOU be eliminated within 18 months of entry into force and that no such missiles, launchers, or support equipment be possessed thereafter. Within 90 days of entry into force, all deployed shorter-range missiles and all deployed and non-deployed launchers for those missiles must be moved to elimination facilities. Within 12 months of entry into force, all non-deployed shorter-range missiles must be moved to elimination facilities. Missiles and launchers must be at different elimination facilities not less than 1,000 kilometers apart. This provision has the effect of removing shorter-range missiles from an operational status early on in the elimination process.

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[1] The disparity in numbers of warheads permitted on deployed launchers (171), deployed missiles (180) and deployed plus non-deployed missiles and launchers (200) arises because of a military requirement for spare missiles with deployed forces and in non-deployed status. For example, the United States deploys Pershing II batteries with nine missiles and launchers, and one spare missile. As a backup for the total deployed force, and the Army might wish to have a few additional missiles in a non-deployed status as spares.

Article VI prohibits the production and flight-testing of intermediate-range and shorter-range missiles. The launching of intermediate-range missiles is allowed only for destruction purposes, and the launching of shorter-range missiles is prohibited. Also banned is the production of stages and launchers for prohibited missiles. Each party has the right to produce a non-Treaty-limited missile having a stage which is outwardly similar to, but not interchangeable with, one stage of a banned missile. However, only one stage a non-Treaty-limited missile is excepted under this provision. This makes it clear that continued Soviet production of the SS–25 is not prohibited. In no case can a missile stage be produced that is "interchangeable" with a stage of a prohibited missile. See Section VII (B) for a complete discussion of Article VI.

Article VII sets forth counting and type rules.

Article VIII specifies allowed locations for both intermediate-range and shorter-range missiles and launchers.

Article IX sets forth the obligations for data exchanges and notifications related to the elimination of missile systems.

Article X sets forth the basic obligations for the elimination of items and facilities as required by the Treaty.

Article XI sets forth the plan for required on-site inspections.

Article XII states that each Party will use National Technical Means (NTM) at its disposal to help ensure compliance, and obligates each Party not to interfere with the other Party's NTM. The Parties are prohibited from using any concealment measures that impede verification of compliance by NTM. (The prohibition in SALT I and II was only against deliberate concealment measures.) Article XII does not cover normal practices in a deployment area, including the use of environmental shelters. The article also includes a provision applicable for three years or until a new strategic offensive arms agreement is in force, whichever comes first, requiring the Soviet Union to cooperate in allowing satellite inspection of SS–25 deployment bases to ensure that SS–20 missiles are not covertly deployed at such bases. The United States may request up to six such inspections per year with only one SS–25 base being subject to each inspection.

Article XIII provides for the establishment of a Special Verification Commission (SVC) which would meet at the request of either Party to resolve compliance questions and to agree upon measures to improve the viability and effectiveness of the Treaty.

Article XIV obligates the Parties to comply with the Treaty and not to assume conflicting international obligations or undertakings. The Executive Branch has assured the Committee that this provision entails no obligations beyond those already contained in the Treaty. Article XIV does not affect U.S.-NATO weapons cooperation other than to prohibit the production or transfer of an intermediate-range or shorter-range missile, missile stage, or launcher—prohibitions which would apply with or without Article XIV. The United States is permitted to produce or transfer lesser components (including such as guidance elements), technology, or blueprints to its allies.[2]

Article XV provides that the Treaty shall be of unlimited duration and specifies that each Party shall have the right to withdraw from the Treaty after giving six months' notice "if it decides that extraordinary matters related to the subject matter of this Treaty have jeopardized its supreme interests."

B. PROTOCOLS

1. Memorandum of Understanding

The Memorandum of Understanding (MOU) provides detailed data as of November 1, 1987, on the locations of deployment areas, missile operating bases, and missile support facilities, as well as the numbers of missiles, launchers, support structures and support equipment at those locations. An initial update of data will occur 30 days after entry into force of the Treaty and at six-month intervals thereafter. Pursuant to Article XIII of the Treaty, the data exchanges subsequent to entry into force are to be provided through the Nuclear Risk Reduction Centers, which are also to be used in the exchange of required notifications and other information.

2. Protocol on Procedures Governing Eliminations

This Protocol sets forth the detailed procedures for the elimination of items subject to the Treaty. Each missile system is treated separately, and the specific parts to be eliminated are dealt with item-by-item. In the case of the Soviet SS-20, for instance, separate procedures cover the missile, its launch canister, its launcher, its missile transporter vehicle, and the fixed structure for its launcher.

Paragraph 9 of Section II contains the only reference in the transmitted Treaty, Protocols, and MOU to the anticipated elimination by the Federal Republic of Germany of its force of 72 Pershing IA missiles. On August 26, 1987, the West German government announced that it would eliminate its force when the United States and the Soviet Union had completed the eliminations specified under the Treaty. Accordingly, the United States and the Soviet Union agreed to eliminate their missiles 15 days before the end of the three-year period specified for eliminations. At that point, the existing program of cooperation will cease, and the United States will withdraw the warheads for the West German missiles to its own territory.

3. Protocol Regarding Inspections

This Protocol sets forth the procedures under which the Treaty's on-site inspection provisions are to be implemented. These inspections are tied to the required exchanges of data, notifications, and other information, and are designed to serve, together with National Technical Means, to verify compliance with terms of the Treaty.

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[2] At the request of Chairman Pell, the Executive Branch provided the Committee with a classified analysis of the legal effect of Article XIV based on the negotiating history of the provision. The Administration's analysis, based on the negotiating history, also covers the following issues: the effect of the INF Treaty on the German Pershing IA missiles, the effect of Article XI on inspection rights in basing countries, Privileges and Immunities under the Inspection Protocol, and the effect of Article XII on concealment practices. The classified analysis will be retained in the Committee files.

The Annex to this Protocol sets forth the privileges and immunities to be applied to inspectors and aircraft crew members during their presence in the country being inspected and thereafter, with respect to acts performed in the course of their official functions.

C. BASING COUNTRY AGREEMENT

The purpose of this agreement is to provide authorization by nations allied with the United States for Soviet access to their territory to carry out the inspections provided for in the Treaty and its Protocols. The Soviet Union has reached a similar agreement with its allies in order to guarantee access by the United States to carry out specified inspections.

D. TREATY TERMS IN BRIEF

The following tables and summaries outline the provisions of the Treaty, the Protocols, and the Memorandum of Understanding:

The Treaty requires that the United States and the Soviet Union:

Eliminate all intermediate-range (1,000–5,500 kilometers) missiles and launchers in phases over three years.

Eliminate all shorter-range (500–1,000 kilometers) missiles and launchers within 18 months.

Not produce, flight-test, or possess such systems for the indefinite duration of the Treaty.

1. Intermediate-Range Missiles to be Eliminated

These are the missiles to be eliminated, as reported in the MOU:

	Deployed	Nondeployed	Total
United States:			
Pershing II	120	127	247
GLCM's	309	133	442
Total	429	260	689
Soviet Union:			
SS–20's	405	245	650
SS–4's	65	105	170
SS–5's	0	6	6
Total	470	356	826

2. Shorter-Range Missiles to be Eliminated

	Deployed	Nondeployed	Total
United States: Pershing IA (total)	0	170	170
Soviet Union:			
SS–12/22	220	506	726
SS–23	167	33	200
Total	387	539	926

Under the terms of the Treaty, nuclear warheads and guidance systems for the missiles are retained by the owning Party and are not accountable under the Treaty. Under the assumption that deployed missiles would have nuclear devices available and non-deployed missiles would not, the reduction of deployed nuclear warheads under INF looks like this:

	Missiles	Warheads
United States:		
Pershing II	120	120
GLCM's	309	309
Total	429	429
Soviet Union:		
SS–20	405	1,215
SS–4	65	65
SS–12/22	220	220
SS–23	167	167
Total	857	1,667

3. *Elimination Process*

Intermediate-range missiles and launchers can be located only in designated deployment areas, support facilities, elimination facilities, or in specified transit.

Within 90 days of entry into force, all deployed shorter-range missiles and all launchers must be moved to separate elimination facilities. All non-deployed shorter-range missiles must be so moved within one year.

Within 29 months, deployed and non-deployed intermediate-range missiles and launchers are to be reduced to common, specified ceilings, and the ratio of deployed and non-deployed ballistic missiles to all deployed and non-deployed missiles shall not exceed the ratio as of the November 1, 1987 data exchange.

Missile systems are to be reduced in complete organizational units.

Key support structures are to be eliminated where they stand.

Destruction is to be carried out only at mutually agreed facilities.

During the first six months following entry into force, a maximum of 100 intermediate-range missiles, but no shorter-range missiles, may be eliminated by launching.

4. *Data Exchanges*

The initial data exchange was as of November 1, 1987, and is included in the Memorandum of Understanding and associated documents.

Within 30 days of entry into force, updates of data are to be provided. Subsequent updates are required within 30 days following each six-month interim.

Notifications of various activities are required, including:

—The origin and destination of missiles and launchers in transit, with information on their location provided for specified intervals;

—The dates for the elimination of deployment areas, bases, and support facilities;

—The date, place, number, and type of missiles and launchers to be destroyed at specified elimination sites;

—The date, place, and type of missiles to be destroyed through launch.

5. Verification

National Technical Means (satellite and other intelligence collection means) will be important in verifying compliance. The Parties have agreed both not to interfere with each other's NTM and to take specific steps to enhance each side's ability to monitor compliance by NTM.

There are a number of on-site inspection rights established in the treaty, including:

Baseline Inspections—To help in verifying initial data, there is a right to conduct on-site inspections of agreed locations listed in the Memorandum of Understanding within three months after entry into force.

Close-out Inspections—When bases or missile support facilities are eliminated, the Parties will have the right to conduct inspections to observe that Treaty-prohibited activities have ceased at those facilities.

Elimination Inspections—Each side has the right to observe the destruction of missiles and launchers at the elimination sites. This right to observe elimination of missiles and launchers is not restricted by any quota.

Short-notice Inspections—For thirteen years after the Treaty enters into force, the United States and the USSR are entitled to conduct a specific number of short-notice inspections per year of agreed locations. During the first three years of the Treaty, each side has the right to 20 short-notice inspections per year at both currently active bases and facilities, as well as those that will have been eliminated. For the first five years after the complete elimination of INF missile systems, each side can conduct 15 on-site inspections each year. For the next five years, each side can conduct 10 similar inspections each year.

Portal Monitoring—For 13 years, the U.S. will have the right to continuously monitor portals of the Soviet Votkinsk Machine Building Plant (where the final assembly of the SS–25 strategic missile occurs using a stage similar to that of the SS-20) and the Soviets will have the same right with regard to U.S. Hercules Plant Number One at Magna, Utah (at which existing types of intermediate-range or shorter-range ballistic missiles were produced). These monitoring rights would end if, after two years, the final assembly of SS–25 missiles at Votkinsk ceased for 12 months. If SS–25 assembly resumed there or elsewhere, continuous monitoring would be permitted.

III. BACKGROUND: THE ROLE OF NUCLEAR WEAPONS IN NATO

American deployments of nuclear weapons in Europe began in the early 1950's. Known then as "theater nuclear forces" (TNF)[3] these weapons served as a significant adjunct of the U.S. strategic capability and as a "substitute" for larger NATO conventional forces, since conventional parity with the Warsaw Pact was judged politically and economically unattainable—and also, given U.S. nuclear superiority, unnecessary.

Among the early U.S. nuclear deployments in Europe were intermediate-range bombers and ballistic missiles targeted on the USSR. These were later phased down, however, as new technologies permitted the adoption of more distant and survivable basing strategies (U.S.-based bombers, ICBM's, and SLBM's[4]) which allowed for an extra-European capability to strike the Soviet Union. By the time of the Cuban missile crisis, when President Kennedy tacitly agreed to remove U.S. missiles from Turkey, he was "sacrificing" systems already designated for withdrawal.

Accordingly, by the early 1960's U.S. nuclear systems had tended to bifurcate into (*a*) shorter-range European-based "tactical" or battlefield systems and (*b*) "strategic" systems able to strike the Soviet Union from submarines and from missile sites and bomber bases in the United States. Falling between these two categories—and thus into a "gray area"—were so-called forward-based systems (FBS), primarily in the form of U.S. nuclear bombers capable of reaching Soviet territory from carriers at sea and from bases in the United Kingdom.

A. EVOLUTION OF THE ROLE

When American nuclear weapons were first deployed in Europe, the governing U.S. strategic doctrine was "massive retaliation"—in essence, a nuclear first-strike against the Russian homeland in the event of any Soviet aggression against NATO. The Soviets were seen as distinctly inferior in strategic power, able to dominate Eastern Europe with conventional force but unable to attack Western Europe without a devastating U.S. response and unable to threaten the United States itself.

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[3] Before the Reagan Administration, the term "TNF" was commonly used to describe all U.S. nuclear weapons in Europe and "Long-Range TNF" (or LRTNF) was used to designate those weapons capable of striking targets in the Soviet Union. The Reagan Administration adopted the term "Intermediate-range Nuclear Forces" (or INF) to describe all TNF with ranges between 500 and 5,500 kilometers. "LRINF" replaced "LRTNF," referring to weapons with ranges between 1,000 and 5,500 kilometers. This led to the use of a somewhat clumsy "shorter-range intermediate-range nuclear forces" (or SRINF) to describe weapons with ranges between 500 and 1,000 kilometers. The "double zero" approach in the new INF Treaty refers to LRINF and SRINF. In the Treaty, LRINF are referred to as IRM's (intermediate-range missiles) and SRINF are referred to as SRM's (shorter-range missiles).

[4] ICBM's are intercontinental ballistic missiles and SLBM's are submarine-launched ballistic missiles.

By the late 1950's, however, Soviet missile development had created the perception of a significant nuclear threat to both Europe and the United States, provoking serious debate in the Atlantic Alliance about European vulnerability and the credibility of America's deterrent. The famous question posed by De Gaulle was whether an American President would ever risk New York for Hamburg or Paris. This situation served as a spur to the national nuclear programs of Britain and France and stimulated discussion, primarily in the United States, of possible NATO responses, eventually engendering a proposal by the Supreme Allied Commander, Europe (SACEUR) for a NATO-controlled intermediate-range nuclear missile.

In the early 1960's, in the face of French moves to establish a nuclear deterrent independent of NATO, the United States proposed creation of a Multilateral Force (MLF), which as intended to finesse the SACEUR proposal and to head off further nuclear proliferation by allowing the Federal Republic of Germany (FRG) to participate directly in an Alliance deterrent. Envisaged as a limited size, mixed-manned, seaborne force, with U.S. weapons unambiguously targeted on the USSR, the MLF ultimately failed because of its doubtful military effectiveness and, perhaps more significantly, because the United Kingdom and France perceived it as designed specifically for the West Germans and therefore as threatening to erase much of the distinction between them and the FRG.

Upon dropping the MLF proposal in 1964, the United States instead—

(*a*) Advanced suggestions for improved consultation machinery. This ultimately led to creation of NATO's Nuclear Planning Group (NPG), in which the FRG and Italy were given equal status with the United States and the United Kingdom (France by that point having withdrawn from NATO's integrated military command structure);

(*b*) Rapidly expanded its INF deployments, primarily in Germany, creating further physical evidence of the American commitment which the FRG considered even more important than the proposed MLF arrangements; and

(*c*) Undertook efforts to spread nuclear participation and responsibility within NATO through bilateral Programs of Cooperation (POC's), which provided nuclear weapons (artillery, tactical missiles, naval nuclear bombs, and nuclear-capable aircraft) on a dual-key [5] basis to seven Allies (including the FRG) and which came to involve nearly half the U.S. nuclear weapons deployed in Europe.

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[5] Although the phrase "dual key" originated in the requirement that two officers are needed to activate a nuclear weapon, it also came to be used to refer to the joint decision-making involved in the use of nuclear weapons deployed in Europe. Precise consultation procedures for the use of nuclear weapons during a NATO conflict were established in 1962 under the so-called Athens Guidelines. Subsequent elaborations of these Guidelines provide that special weight be accorded the views of those NATO countries on or from whose territory nuclear weapons would be employed, countries providing the warheads, and/or the countries providing or manning nuclear delivery systems. It is well understood, however, that agreed consultation procedures will be exercised only if time and circumstance permit and that the nuclear powers have the final responsibility for the decision to use nuclear weapons. Overall, the joint decision-making concept can be said to apply in two different senses. In the case of European-owned delivery systems (with the exception of the independent systems of France and the United Kingdom), it refers to the need for the United States to authorize the release of warheads to the country in question. In the case of U.S.-owned and operated systems, it refers to the NATO consultation process, to be followed where possible.

Viewed broadly, this combination of arrangements was a response to NATO's first nuclear "crisis": How to cope with the erosion of U.S. nuclear superiority. Such superiority was an inherently transient phenomenon; and with the Soviet achievement of virtual nuclear parity in Europe and a substantial nuclear strike capability against the United States itself, the first phase in the loss of that superiority had now occurred.

For the time, NATO's response served to lay the issue to rest, as additional U.S. weapons provided military and political reinforcement of the American commitment to Europe, while joint planning and dual-key procedures provided a reinforced sense of collective involvement and some reassurance that effective checks surrounded the decision to resort to nuclear weapons. But the inevitable second crisis—how NATO would deal with the implications of full strategic parity when it arrived—still lay ahead. How would American strategic forces truly remain "coupled" to Europe if their use in Europe's defense would be a suicidal act for the United States?

Because U.S. nuclear strength was, from an early point, integral to NATO's posture, any apparent alteration in American nuclear doctrine or deployments has always touched directly on West European sensitivities. A pointed example came in the aftermath of the 1962 Cuban missile crisis, when the withdrawal of Soviet-targeted U.S. missiles from Italy and Turkey was, despite U.S. denials, generally understood by Europeans to be a trade for Soviet withdrawals from Cuba. It was in part to provide clear assurance that the U.S. nuclear commitment remained firm that the United States subsequently undertook to maintain a certain number of Polaris submarines in the Mediterranean, and later supplemented this with the allocation of a substantial number of Poseidon SLBM warheads to SACEUR for targeting purposes. Placing such systems under SACEUR helped perceptually to tighten the "coupling" between tactical and strategic systems.[6]

Meanwhile, in response to steadily increasing Soviet nuclear delivery capabilities, American planners became concerned with the implications of a deterrence doctrine which relied too heavily on nuclear escalation. While "massive retaliation" had not been the declaratory policy of the United States since the late 1950's, no new doctrine had yet replaced it. In an effort to raise the nuclear threshold, the U.S. began to place greater emphasis on conventional defense, and in 1967 Allied and U.S. interests were reconciled under the umbrella of a revised NATO doctrine (known by nuclear strategists as MC-14/3) which embodied the concept of a balanced deterrent continuum. This doctrine, which came to be known as "flexibile response," envisaged an "escalatory ladder" involving a "NATO Triad" of conventional, theater nuclear, and strategic forces.

Left deliberately vague were the circumstances under which nuclear weapons, either theater or strategic, might be employed. But the intention to use nuclear weapons as necessary—and first if necessary—remained a part of NATO's basic strategy of deterrence. Previously, in the immediate postwar period, nuclear weapons had compensated for Western Europe's political and economic disintegration. Now, with growing European unity and prosperity, NATO's continued reliance on nuclear weapons became a matter of choice. Economically, NATO's first-use policy meant maintaining deterrence on the cheap. But economic convenience was also fortified by a genuine political and military belief: that the specter of nuclear conflagration might actually be the best means to avert still another intra-European war.

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[6] No U.S. nuclear weapons, even those under SACEUR, may actually be used without affirmative, Presidential decision.

Throughout this evolution of circumstances and doctrine, the political implications of nuclear weapons varied widely among different Allies:

—For the United States, U.S. INF provided essential evidence of the American commitment to the defense of Europe and a strong basis for American leadership of the Alliance.

—For the United Kingdom, which developed its own nuclear capability in cooperation with the United States, nuclear weapons contributed to the "special relationship" and offered a limited measure of independence and political influence.

—For France, nuclear weapons raised an issue of credibility—whether Europeans could really expect the U.S. to place itself at nuclear risk in the event of a Soviet conventional rout of NATO—and presented a means to assert national political independence by developing an autonomous nuclear capability and withdrawing from participation in NATO's integrated military command.

—For the Federal Republic of Germany, in contrast, nuclear weapons became a source of perpetual tension. Having been constrained from the development or possession of nuclear weaponry, first by the West European Union (WEU) Treaty of 1954 and again by the Non-Proliferation Treaty (NPT) of 1968, the FRG has remained highly sensitive to its special status of full dependence on the U.S. nuclear guarantee. Accordingly, nuclear posture and doctrine have periodically surfaced as central topics of concern within West German politics, as FRG officials have sought to reassure themselves and their public that the threat of strategic escalation is credible (meaning that nuclear war is not being considered a matter for German territory alone) and that this threat will effectively deter Soviet conventional attack.

For more than thirty years, the presence of U.S. nuclear forces in Europe has remained a source of ambivalence for most West Europeans. They have found reassurance in the deterrence capacity of U.S. forces and the demonstration of U.S. willingness to "couple" itself to Europe in a common defense. But they have obviously regarded with severe apprehension the thought that theater nuclear forces might be actually used in anything resembling classic military combat.

Many Europeans have also perceived a paradox: that rather than "coupling" the U.S. to Europe, American nuclear deployments might ultimately have a perverse "decoupling" effect—by permitting the possibility of a devastating war on European soil without danger to, and hence strategic commitment by, the United States.

To overcome this "decoupling" paradox—by which American commitments of INF might actually enable the United States to limit its involvement and risk in a European war—American and European officials have generally sought to emphasize the deterrent aspects of INF deployments, stressing their role in linking conventional forces in Europe to U.S. strategic forces rather than the warfighting capabilities of specific INF systems.

Inevitably, European views on the reliability—and the desirability—of the "coupling" of America and Western Europe for defensive purposes have fluctuated over time, under the influence of such factors as the internal European political climate, the state of East-West relations, recurrent debates on arms control and NATO strategy, the presence and visibility of U.S. nuclear forces in Europe, and perceived trends in American and Soviet military strength. But most important has been the general European perception as to the wisdom and stability of American leadership.

On the other hand, European confidence in "coupling" has continued to be fortified by several constants: the presence in Europe of a substantial U.S. conventional force (at present, some 325,000 military personnel plus their associated dependents); the large number of American citizens permanently residing in Europe; U.S. business investments in Europe with a collective annual product surpassing the GNP's of all but a few nations in the world; and, of course, the pervasive understanding that American interests would be severely damaged should Soviet influence and domination be allowed to intrude into Western Europe.

Today, the essence of NATO doctrine continues to be the concept of "flexible response" adopted 20 years ago. Deterrence is seen to rest on the possibility that all legs of the NATO Triad, up to and including U.S. strategic forces, might be called upon to support the others. For the Europeans, a doctrine providing for the possibility of escalation to theater and strategic systems constitutes the essence of the U.S. nuclear guarantee. This, it bears reemphasis, has been both reassuring—in that it means the Soviet Union cannot expect to fight Europe alone—and a source of constant anxiety since it underscores the extent to which European security is dependent on the United States and, in a crisis, on an American President's willingness to place his nation at risk.

From the perspective of NATO planners, the "flexible response" doctrine continues to serve several purposes:

(*a*) to maximize Soviet uncertainty about the nature of NATO's response to attack,

(*b*) to minimize the political burdens on West European governments of a rigid employment plan which might imply an automatic recourse to nuclear weapons and which might seem to focus excessively on their territory, and

(*c*) to enable NATO to attempt to control escalation in the event of war (though many NATO officials are skeptical that escalation could be contained short of an all-out nuclear exchange).

In the effort to equip the Alliance for "flexible response," NATO planners have devised a range of nuclear options through a variety of geographically dispersed weapons with different yields: dual-capable tactical aircraft, nuclear artillery and land-based missiles, atomic demolition mines, maritime nuclear weapons, and U.S. and U.K. SLBM's targeted by SACEUR. Additional options are provided by the general commitment of U.S. strategic forces to NATO and, specifically, by American planning for Limited Nuclear Options (LNO's), under which U.S. strategic forces could be used selectively in direct support of Alliance objectives—for example, to hit supply, marshaling, and communications operations in the Soviet Union.

While this broad range of options has generally been thought to enhance deterrence by providing for measured—and therefore credible—responses, some Europeans have argued that LNO's are "decoupling" for a familiar reason: they could help the United States to limit a conflict to the European theater. The American response has been that including LNO's in the Single Integrated Operational Plan (SIOP) of U.S. strategic forces has made their use more credible and simply compounds the deterrent effect of a military "coupling" that is already emphasized by (*a*) the integration of SIOP and SACEUR target planning, and (*b*) the assignment of U.S. assets to SACEUR—both the highly visible systems such as dual-capable aircraft and the less visible but highly capable strategic systems (SLBM's).

Put most simply, since even a supposedly "limited" strike using American strategic systems would entail a high risk of Soviet retaliation against the United States, the threat to resort to such strikes—to the degree that it is credible—is highly "coupling."

Ultimately, the "coupling" argument always returns to a basic tension between two images that might be labelled "doomsday" and "paralysis." In the "doomsday" model, NATO's posture has effectively "coupled" the U.S. to Europe by making uncontrolled nuclear escalation in the event of war sufficiently likely that Moscow must regard any act of aggression against Western Europe as a potential act of suicide. But the concept of suicide also gives rise to the "paralysis" image, under which no rational President would actually initiate a nuclear escalation that would likely bring devastating retaliation against his own country. In the first image, Moscow refrains from attack for fear of holocaust; in the second image, the U.S. refrains from response for the same reason.

B. THE "DUAL-TRACK" DECISION OF 1979

In a famous October 1977 speech at the International Institute for Strategic Studies in London, West German Chancellor Helmut Schmidt gave notice that the long-inevitable NATO crisis over U.S.-Soviet strategic parity had finally arrived. The essence of Schmidt's argument was that a condition of strategic parity—which was about to be codified in SALT II—would have the effect of neutralizing U.S. strategic forces, meaning that in actual practice American decision-makers would be unlikely, in almost any circumstances, to resort to the first-use of strategic forces. Similarly, Soviet superiority in long-range theater systems would tend to deter the use of NATO INF: How could NATO rationally escalate to nuclear warfare when it had no preponderance even within the European theater? The resulting danger was that Soviet conventional and theater nuclear superiority could be brought to bear against Western Europe—at least as a major source of political leverage.[7]

Over the past decade, Schmidt's speech has come to be remembered as a sound of alarm over new SS-20's, intermediate-range missiles which the Soviets began to deploy in 1977 to replace older SS-4's and SS-5's. And that indeed was a part of Schmidt's concern, since the SS-20 was strengthening Soviet theater nuclear capabilities at a time when NATO's long-range INF—mainly U.S. and U.K. aircraft stationed in Britain—were being rendered less credible by age and by improved Soviet air defenses. Thus, the INF balance was shifting further to Soviet advantage.

But Schmidt's larger concern was "coupling." His speech reflected German worry that a "gap" existed in the NATO Triad such that, beyond the level of battlefield and short-range systems, NATO had few escalation options available to retaliate against the Soviet Union itself, short of calling on U.S. external strategic forces. And these, in an era of strategic parity, the United States would not readily launch, even in a limited nuclear strike, for fear of rapid escalation to a full strategic exchange. The powerful implication of this line of reasoning was that NATO needed a stronger European-based nuclear capability to reaffirm "coupling," to provide a direct counter to the threat posed by Moscow's growing theater nuclear and conventional capabilities, and to provide needed leverage by which to involve theater-range systems in any future U.S.-Soviet agreement on nuclear arms.

In response to this German argument, U.S. and other NATO officials pointed out that attempting to create a regional European ("Eurostrategic") balance could in itself strongly imply the "decoupling" of U.S. strategic forces, and thus paradoxically serve to undermine deterrence in Europe. FRG officials responded that their concern was less to create a perfect theater balance than to strengthen the "continuum of deterrence." This would help to deter the Soviets directly by placing the USSR itself immediately at risk from U.S. forces in the theater, and strengthen deterrence further by greatly increasing the likelihood of theater nuclear warfare that could quickly escalate to a full strategic exchange. In short, the German aim was to preserve peace by reinforcing the "doomsday" model.

The anticipated codification of superpower parity in SALT II would in itself have been sufficient to raise new questions about the adequacy of nuclear deterrence in Western Europe. But such questions were given a greater sense of urgency by a combination of two factors: the legacy of the 1978 neutron bomb fiasco[8] and the physical fact of Soviet deployments of new nuclear weapons having a long-range theater capability—the SS-20 and the Backfire bomber. While it was recognized that these weapons represented no more than an inevitable upgrading of Soviet weaponry commensurate with advances in technology,[9] NATO officials felt a compelling need to devise a unified Allied response which would:

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[7] For historical accuracy, it should be noted that Schmidt's speech focused heavily on economic strength as the crucial pillar of Western security, and somewhat less on the INF issue for which it is now notorious.

[8] Enhanced radiation warheads (ERW's) were envisaged as an improvement in NATO deterrent posture in that they would render more credible NATO's use of short-range systems on its own territory in the event of Warsaw Pact invasion. However, in response to a European public outcry over weapons that "destroyed people but not buildings," President Carter reversed NATO's deployment plan and was thereupon bitterly criticized by Chancellor Schmidt, who had expended considerable political capital to win German political support for ERW deployment, only to find the plan cancelled without consultation.

(*a*) Satisfy FRG anxieties about "decoupling";

(*b*) Neutralize any sense that the European theater power balance was shifting against NATO;

(*c*) Demonstrate to all concerned the ability of the Alliance to act decisively on a subject which, as the neutron bomb episode had shown, was politically sensitive; and

(*d*) Persuade the Soviets to submit the SS-20 and the Backfire bomber to future arms negotiations by making clear that, without limitations, the Allies would make deployments to counter Soviet theater increases.

During 1978, a consensus was reached within NATO that INF "modernization" should include deployment on the continent of improved long-range nuclear weaponry specifically capable of reaching Soviet soil. Although sea-based forces could arguably fulfill the same mission, land-based systems were selected in response to the emphasis of Schmidt and other German officials on the "visibility" of the new INF commitment. Thus, not only would the new deployment fill in the "missing rung" on NATO's "ladder of escalation," it would reaffirm "coupling" politically and psychologically.

By the end of 1978, however, the political difficulties of actually upgrading NATO's long-range theater nuclear capability had begun to become apparent. For Chancellor Schmidt, the introduction into West Germany of weapons capable of striking Soviet soil raised concern about the possible international response. To ensure that the FRG would not alone bear the brunt of Soviet reaction to NATO INF modernization, and also to remove any suspicion that West Germany might be seeking a change in its nuclear status, Schmidt promulgated a "non-singularity" policy by declaring that, while a NATO response to the SS-20 was necessary, Germany would not allow itself to be the only continental country to accept deployment of long-range nuclear weapons. This policy placed a political burden of deployment on other continental countries, the obvious candidates being those in which tactical nuclear weapons were already deployed: Belgium, Holland, and Italy.[10]

In addition, within Chancellor Schmidt's SPD party, those concerned that détente not be jeopardized offered an argument similar to that raised in connection with the neutron bomb: that no deployments should be made until an arms control effort to stop the theater nuclear build-up had at least been tried with the Soviets. This approach found active support in other European countries, particularly among leaders who recognized the potential difficulty of persuading public opinion of the need for new nuclear deployments. Political reality thus dictated that NATO's INF modernization effort should be joined to an arms control initiative. Since SALT II was proceeding toward a conclusion, expectation developed that the scope of negotiations in SALT III could be expanded to include theater forces.

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[9] While having the advantage of mobility, MIRVing, and increased accuracy, the SS-20 actually has less throw-weight than the SS-4's and SS-5's it replaced.

[10] Although tactical nuclear weapons were also deployed in Greece and Turkey, possibilities for new long-range TNF deployments in those countries were prejudiced by Greece's withdrawal from NATO's military structure and tensions between Turkey and the United States relating to Cyprus. Meanwhile, Norway and Denmark continued to adhere to firm policies of not allowing the deployment of nuclear weapons in their territories.

Throughout 1979, NATO officials worked on modernization options, agreeing at an early point that between 200 and 600 missiles should be deployed. The rationale demonstrated the paradoxical nature of the "coupling" concept. Fewer than 200 were thought inadequate to achieve a reaffirmation of "coupling." More than 600 long-range INF missiles would suggest an effort to create a separate theater nuclear balance, which had the "decoupling" implication of a posture not linked to American strategic forces. In June 1979, the U.S. side was careful in signing the SALT II accord to emphasize that the Treaty's prohibitions would not affect any NATO plan for INF modernization.

Finally, on December 13 in Brussels, Allied ministers met a long-established deadline by formally approving the "dual-track" decision—to proceed simultaneously with INF modernization and INF arms control. This decision was to become a landmark in the history of the Atlantic Alliance.

While implementing it would prove to be a major challenge, the plan itself was not complicated: Four years hence, in late 1983, NATO would begin deployment in Germany, the UK, Italy, Belgium, and Holland of 572 U.S.-owned and operated Pershing and ground-launched cruise missiles (GLCM's)—unless arms control progress had provided the basis for adjusting or abandoning this decision. Of the 572 missiles, 464 would be GLCM's to be placed in all of the deployment countries: 160 in the UK, 112 in Italy (Sicily), 96 in Germany, and 48 each in Belgium and Holland. Deployments would be phased over several years. The remaining 108 missiles would be Pershing II's which, at the beginning of the deployment schedule, would replace an equal number of Pershing IA's in Germany under the control of U.S. forces. The 72 Pershing IA's under the control of FRG forces would remain unchanged—another aspect of Schmidt's effort to limit domestic and Soviet reaction by keeping the "German" dimension of the plan as limited as possible.

C. IMPLEMENTATION OF NATO'S "DUAL-TRACK" DECISION

Ironically, only two weeks after NATO reached the "dual-track" decision, the plan's political premises began to unravel. On December 26, the Soviet invasion of Afghanistan foreclosed the possibility of SALT II ratification and thus cast into jeopardy the arms negotiation process that NATO officials had counted on to assuage public opinion. Eleven months later, NATO's ability to retain public support for the modernization "track" was cast further into doubt by the election of Ronald Reagan, whom many Europeans perceived as excessively belligerent in East-West relations and as opposed to nuclear arms control. NATO thus faced the task of proceeding toward INF modernization in a climate of growing public anxiety about arms control and American leadership—and, consequently, about the dangers of nuclear war.

In late 1981 President Reagan, acting in large measure to placate such European concerns, announced his first arms control initiative: the so-called "zero option." This concept had originated in the left-wing of the German SPD, which hoped to avoid the political turmoil of deployment. When adopted by the Reagan Administration, however, the "zero option" was widely criticized as unrealistic: something for nothing. Few expected the Soviets to dismantle their new SS–20's, and their long-deployed SS–4's and SS–5's as well, in exchange for a NATO decision to forgo a deployment that would be politically painful if not impossible. This expectation proved sound; prior to NATO's deployment, the Soviets showed far less interest in an INF deal than in fueling public opposition to deployment within the Alliance.

One apparent possibility for a pre-deployment deal arose in 1982, when U.S. arms negotiator Paul Nitze and his Soviet counterpart agreed informally, during a "walk in the woods" outside Geneva, that the two sides should be limited to 75 INF launchers and 150 nuclear-capable aircraft in Europe. Under this formula, the 75 Soviet SS–20's would have carried a total of 225 warheads and the 75 U.S. launchers a total of 300 GLCM warheads. But that formula was later rejected by both sides, the Pentagon's opposition being based on an unwillingness to sacrifice the ballistic Pershings.

In November 1983, following an FRG parliamentary decision to proceed with Pershing and GLCM deployments, the Soviets capped an anti-deployment campaign of threats and appeals aimed at West European opinion by walking out of the Geneva arms talks. In the spring of 1985, however, INF negotiations resumed in an atmosphere changed by two crucial developments. First, NATO deployments had proceeded on schedule in the UK, Germany, and Italy.[11] Second, Mikhail Gorbachev had become leader of the Soviet Union.

Later that year, the first Reagan-Gorbachev summit in Geneva produced no apparent progress on arms control. There the Soviets continued to stress their objection to the President's aspiration—first voiced in a surprise announcement in March 1983—to supersede the ABM Treaty by developing and deploying a space-based "peace shield." Nonetheless, the Geneva summit's joint communique supported the idea of an "interim INF agreement."

In October 1986, at the Reykjavik summit, the two sides—amidst a discussion of far-reaching disarmament plans—tentatively agreed on what amounted to a variation on the "zero option." All INF would be removed from Europe, with 100 Soviet INF warheads in Asia offset by 100 U.S. INF warheads retained within the United States. The entire Reykjavik discussion ultimately foundered, however, on the issue of long-range compliance with the ABM Treaty.

Over the ensuing year, the Soviet position fluctuated on the question of whether an INF deal must be tied to the question of strategic defenses. Meanwhile, at Soviet initiative, discussion of an INF deal expanded to a "double zero" that would include SRINF and thus all systems with ranges between 500 and 5,500 kilometers. In July, Secretary Gorbachev publicly announced his support for this concept, and in December 1987 at the third Reagan-Gorbachev summit the two sides signed a treaty embodying the "double zero" concept, to be implemented over a period of three years.

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[11] Allied planners presciently assigned Belgian and Dutch deployments to a later phase. Belgian GLCM deployments began in 1985; Dutch deployments have not yet begun.

In intermediate-range missiles, the Treaty will require the Soviets to dismantle 470 deployed missiles capable of carrying 1,280 warheads, as against 429 deployed U.S. missiles carrying 429 warheads. In shorter-range INF—the second "zero"—the agreement requires the elimination of 387 deployed Soviet missiles carrying 387 warheads; the U.S. has no deployed missiles in this category. The overall trade is 1,667 Soviet warheads against 429 U.S. warheads.[12]

D. THE NEW TREATY IN CONTEXT

In accord with well-established Alliance tradition, both critics and supporters of the INF Treaty now find arguments for their positions in NATO military doctrine and in the politics of NATO.

Critics of the Treaty argue that the most important justification for NATO's INF modernization was doctrinal: to strengthen strategic deterrence and prevent Soviet intimidation of Western Europe by adding credibility to the U.S. commitment to link its own fate to that of Europe. Irrespective of the presence or absence of Soviet theater nuclear forces—i.e., with or without SS-20's—this "coupling" is effectively accomplished by weapons which directly threaten Soviet territory and which heighten the likelihood that Soviet aggression will lead to strategic nuclear warfare. Thus, Treaty critics argue that the "zero option," whatever its utility in the public relations field, was always a bad idea. Meanwhile, they point out, the "zero option" does not deprive the Soviets of any capability vis-a-vis Europe, since Soviet strategic-range missiles can and surely will be retargeted against European targets. Accordingly, they assert that NATO is sacrificing something of great value—strong "coupling"—for a negligible reduction in total Soviet warheads. Still worse, they add, the Treaty will engender a climate of decreased tension that may render NATO publics less inclined to support adequate spending on conventional forces just as the Treaty is making the conventional force imbalance more important than ever.

Treaty supporters argue that NATO's deployments of Pershing and cruise missiles served a purpose which was more political than military, given the many other elements which serve to "couple" the U.S. to Europe. Truly critical, they stress, was that NATO respond collectively to rectify the growing theater nuclear imbalance, which served the Soviet political strategy of intimidating Western Europe by means of military capability uniquely targeted on that area of NATO. This NATO has done, first deploying and then achieving agreed reductions that favor the Alliance by 4:1 in the ratio of deliverable warheads. NATO's success in doing so, they argue, represents a political reaffirmation and a straight-forward military gain that outweigh rarified doctrinal considerations of what nuclear capability is necessary to ensure deterrence. In particular, the elimination of Soviet INF deployments can be seen as strengthening "coupling" by removing the distinction between weapons aimed at Western Europe and those aimed at the United States. The removal of that distinction reinforces the concept of shared risk in NATO and therefore increases Western European confidence in the U.S. commitment to the defense of Europe.

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[12] In addition, however, the U.S. will withdraw the warheads for 72 Pershing IA missiles currently operated by FRG forces under a Program of Cooperation. The FRG has committed itself to dismantling these missiles shortly before the end of the three-year elimination period.

Finally, supporters of the new Treaty point to the future benefits of this apparent success in arms control. At a minimum, it will demonstrate to Allied public opinion that a posture of strength can produce such progress. And, if the INF Treaty—with its unprecedented provisions for missile dismantlement and on-site verification—can lead to the further agreements now under discussion, NATO's security may eventually be greatly enhanced by a comprehensive regime of East-West arms reductions.

IV. A Key Issue: Impact on NATO

A. POLITICAL EFFECT

1. A Tribute to Collective Resolve

The INF Treaty is a tribute to the collective resolve of the North Atlantic Alliance. Its signing marks the successful conclusion of an eight-year process that began with NATO's "dual-track" decision of 1979—a decision to counter the Soviet SS–20 threat with INF deployments or eliminate it through negotiations. With the signing of the INF Treaty in December, NATO has demonstrated that with solidarity and resolve it can achieve its objectives. As Secretary Shultz told the Committee on the opening day of hearings, "the way we and our Allies successfully met the Soviet INF challenge shows that tough-mindedness, clarity of purpose, and resolve pay off."

The SS–20 is a military instrument that was designed and deployed, in part, to accomplish a political objective—the decoupling of the defense of Europe from the United States—since its range clearly made it a threat only to the European part of the NATO Alliance. The Allies responded to that challenge with the 1979 "dual-track" decision. In 1981, as part of the "negotiating track," NATO proposed the global elimination of INF missiles. If the Soviet Union would scrap its SS–20 arsenal, the Allies would forgo the Pershing II and GLCM deployments. When the Soviet Union refused to accept the offer, NATO carried out the "deployment track" of its strategy. In the face of domestic protests, European governments had the courage to follow through with their commitments to deploy INF missiles. When the Soviets realized that their efforts to stop the deployments with bluster and threats had not succeeded, they returned to the negotiating table. Finally, the Soviets accepted the "zero-option" proposed by NATO in 1981 and the INF Treaty was signed in December 1987.

That is the success story of the INF process. The process spanned two American Administrations and several changes of government in Western Europe. Throughout this period, NATO stuck to its strategy with steadfast resolve and achieved its goal—the global elimination of INF missiles. This demonstration of political will, in the face of Soviet efforts to provoke disunity within NATO, has strengthened the political and military credibility of the Alliance. As Secretary Carlucci told the Committee, "having seen the strength and solidarity of the Alliance in peacetime, Moscow is less likely to reach the mistaken conclusion that it could divide the Alliance in a crisis or war."

The INF process has not only increased the credibility of the Alliance in Soviet eyes; it has bolstered support for NATO throughout Western Europe. Public opinion polls show 80–90 percent support for the Treaty. The successful execution of the "dual-track" strategy has shown that NATO is not an obstacle to arms control, but can be an effective instrument for achieving sound arms control. And the Treaty also demonstrates that the Alliance is not just an expression of military strength, but can be an effective means for reducing East-West tensions. Recognition of this fact has produced growing public support for NATO. And in an Alliance of democracies, the continued strength and solidarity of NATO will rest on the support of its people.

2. *Effect of a Failure to Ratify*

Failure to ratify the INF agreement would shatter the growing public support for NATO and destroy the chief lesson of the INF process—that with solidarity and determination, NATO can improve allied security through a combination of armament and arms control. Indeed, a rejection of the treaty would strengthen the political elements in Europe who believe that NATO is an obstacle to arms control and that the only way to ease East-West tensions is through unilateral disarmament. The INF Treaty has undercut that position by demonstrating that NATO will support sound arms control agreements. But failure to ratify the Treaty will breathe new life into the unilateral disarmament movement and could spark a resurgence of the anti-American sentiments that accompanied the INF deployments.

Rejection of the INF Treaty would also violate a collective commitment which NATO governments made to their people. That commitment, made in 1981, was clear and simple. If the Soviet Union was prepared to eliminate its unwarranted SS–20 threat against Europe, NATO would forgo the deployment of INF missiles. Throughout the difficult days of 1983, when the INF deployments began, the U.S. and its Allies reaffirmed this commitment and pledged to seek the removal of all INF missiles. As the U.S. Ambassador to the Federal Republic of Germany, Richard Burt, told the Committee, "if, in having achieved our goal, we were to now repudiate NATO's longstanding commitment by repudiating this Treaty, the consequences would be extremely serious." The people and governments of Western Europe would feel betrayed. Not only would it be difficult to maintain public support for keeping and modernizing U.S. missiles in Europe, but the credibility of the NATO Alliance would be called into question. As Ambassador Burt said, "if I were Mikhail Gorbachev, I doubt I could think of a more welcome development." The INF process, from the 1979 dual-track decision to the December 1987 agreement, has demonstrated the benefits of Alliance unity; a rejection of the Treaty would invite dissension and disunity.

For these reasons, the Committee believes that failure to ratify this Treaty would be a disaster for the Alliance. As former Secretary of State Henry Kissinger told the Committee, "Failure to ratify or attaching conditions requiring renegotiation would generate a crisis in the Atlantic Alliance which in the end would almost certainly lead to the unilateral withdrawal of U.S. missiles from Europe and undermine the cohesion of the Alliance." Virtually every other witness who appeared before the Committee, including all four NATO parliamentarians who testified, reached the same conclusion.

Senators who traveled to Western Europe after the Treaty was signed found that European leaders shared the same view. Senator Biden, Chairman of the Subcommittee on European Affairs, met with Western European leaders in early January 1988. He told the Committee that "after extensive consultation with Chancellor Kohl, President Mitterand, Prime Minister Thatcher, and scores of European officials and parliamentarians, I conclude that our NATO Allies overwhelmingly favor prompt ratification of the INF Treaty." Senator Leahy, who also met with NATO leaders in January, told the Senate that "the Alliance unanimously wants prompt ratification of the INF Treaty and would regard delay, defeat, or derailment through unacceptable conditions a political and military disaster for NATO of very great importance." Finally, in early February, Senator Byrd led a Senate delegation consisting of Senator Pell, Senator Nunn, Senator Boren, and Senator Warner to five NATO countries. Reporting on the trip, Senator Byrd told the Committee that, "although there are differing opinions about the details of how the agreement was handled * * * virtually everyone agreed the Treaty should be ratified. Failure to ratify it would clearly cause a serious crisis in the Alliance, and provide a fertile ground for Soviet mischief-making."

3. The INF Lesson and the Future Direction of the Alliance

While Western European leaders have unanimously endorsed the INF Treaty, some have concerns about where it might lead in the future. These concerns do not stem from the Treaty itself, but from a fear that some will draw the wrong lessons from the INF experience. Many European leaders fear that pressure will now build for the total elimination of nuclear weapons from Western Europe. NATO leaders are concerned that such a denuclearized Europe would become vulnerable to a Warsaw Pact conventional attack. They also believe the elimination of all nuclear weapons from Europe could lead to a decoupling of the U.S. from the defense of Europe. French Prime Minister Chirac has warned of the danger of "entering into the 'salami' tactic which, from one zero option to the next, risked compromising and even reducing to nothing the American presence in Europe."

These are subjects that will be debated in the Alliance and discussed later in this report. But whatever judgments the Alliance reaches on the issues that lie ahead, its deliberations should be guided by the one unambiguous lesson of the INF Treaty experience—and that is the importance of making collective decisions on issues that will affect our common security interests and following through with those decisions.

B. MILITARY EFFECT

1. NATO's Deterrent Posture

The Committee finds that the INF Treaty will contribute to Alliance security in several important ways. The security of the Atlantic Alliance rests on two fundamental pillars—the political will to collectively protect NATO's common security interests, and a viable strategy to defend those interests. The INF Treaty will strengthen both of these pillars. First, the entire INF process, from the 1979 "dual-track" decision to the INF deployments to the achievement of the "zero-option" demonstrated that the Alliance has the political will to make—and stand by—the tough decisions necessary to defend Western security. Second, the INF Treaty will reduce the number of nuclear weapons in Europe, while maintaining NATO's ability to execute its strategy of flexible response.

The bulk of the testimony received at the hearings supports these conclusions. Treaty critics, however, provided different interpretations. First, some critics argued that the achievement of the INF Treaty did not reflect the political strength and cohesion of the Alliance, but a weakening of the American commitment to European security. Second, critics contended that the Treaty would diminish NATO's ability to implement its strategy of flexible response and thereby weaken NATO's deterrent posture. These issues are taken up below.

The INF Treaty and the Strategy of Flexible Response.—The Committee finds that NATO's strategy of flexible response will continue to provide a credible framework for deterring aggression and intimidation after the Soviet and American INF missiles have been eliminated. The strategy of flexible response, which was adopted by NATO in 1967, requires that NATO possess deterrent capabilities that encompass a spectrum of possible responses to Soviet aggression. As General Galvin, the Supreme Allied Commander in Europe, summarized it for the Committee, flexible response "encompasses first of all a plan of direct defense, followed by deliberate escalation, followed by a general nuclear response" if necessary. To effectively execute that strategy, NATO maintains a spectrum of nuclear options from battlefield nuclear weapons to the U.S. strategic forces. The removal of the INF missiles, which have only been deployed since 1983, will not significantly reduce the nuclear options available. As Secretary Carlucci states in his report entitled "Support of NATO Strategy in the 1990's," "NATO will continue to maintain the forces necessary to implement its strategy of flexible response and forward defense." This view was supported by the Supreme Allied Commander in Europe (SACEUR), General Galvin, who told the Committee that "the strategy * * * is viable. And I do not think that * * * there is anything we need to do to change the strategy of flexible response."

Critics of the Treaty presented the Committee with a different view. General Rogers, former Supreme Allied Commander in Europe (SACEUR), argued that the removal of the INF missiles would leave a significant "gap in the spectrum of deterrence." According to this view, by giving up the Pershing II missile, the U.S. will lose a vital option in the ladder of escalation between conventional forces and the use of strategic nuclear forces. General Rogers told the Committee that the withdrawal of the Pershing II will "reduce the credibility of NATO's deterrence in Soviet eyes." Critics argue that none of the remaining nuclear weapons can perform what they regard as the essential mission of the Pershing II—to conduct, with certainty, limited nuclear strikes against targets deep in Soviet territory.

As former Secretary of Defense James Schlesinger, former Undersecretary of Defense Walter Slocombe, former Assistant Secretary of Defense Richard Perle, former U.S. Ambassador to the

MBFR negotiations Jonathan Dean, and others told the Committee, this argument suffers from several weaknesses. One of its most serious flaws is that it exaggerates the importance of the specific escalatory option provided by the Pershing II. NATO strategy has never been so fragile that it depends on any one weapons system. As former Secretary of Defense James Schlesinger told the Committee, "it is a form of parochialism in Europe to suggest that the Soviets have basically been deterred by a relative handful of warheads in Europe, none of which were deployed before 1983." Attaching so much weight to a single weapon ignores the fact that the peace has been kept for 40 years without the presence—except briefly from 1958-63—of U.S. medium range missiles in Europe. According to Dr. Schlesinger, "this is the illusion of concreteness. As weapons systems are deployed they take on presumed virtues and an apparent indispensibility that did not exist prior to such deployment."

This is not to suggest that the Pershing II contributed nothing to NATO security. As Admiral Crowe observed in his testimony to the Committee, "we are never going to negotiate a treaty where we do not give up something * * * But we believe that in this particular one the trade has been favorable to the U.S. and that the balance we are seeing with the implementation of the INF Treaty is better than the one when it started." Among the important military benefits of the Treaty cited by Admiral Crowe is the fact that "the Soviets will lose capability in both the European and Asian theaters. They will no longer have the capacity to hit with ground-launched ballistic missiles * * * our prepositioned major equipment sites and debarkation sea and air ports in Western Europe, thereby enhancing our ability to reinforce NATO." At the same time, Admiral Crowe told the Committee, "the U.S. will retain a spectrum of capabilities to selectively execute NATO's strategy of flexible response."

These capabilities include a variety of weapons systems with more than 4,000 nuclear warheads that will remain in Western Europe after the INF missiles have been removed. As Secretary Shultz told the Committee, "there are substantial U.S. nuclear forces in Europe, including weapons on aircraft, that can reach deep into the Soviet Union." About 1,700 of the remaining 4,000 warheads are nuclear bombs to be delivered by aircraft. Among the aircraft capable of striking deep into Soviet territory are 150 F-111 bombers stationed in Britain. There are also additional F-111's in the U.S. that could be quickly transferred to NATO in a crisis. In addition to these F-111's, NATO has an ongoing program to upgrade the capability, range, and survivability of its other nuclear capable aircraft. As part of this program, NATO continues to introduce upgraded F-16's and Tornado aircraft with greatly enhanced range and penetration capability. Finally, as Secretary Carlucci reported in "Support of NATO Strategy in the 1990's," NATO's planned deployment of the nuclear capable F-15E Strike Eagle in the early 1990's "will significantly augment the capabilities of NATO's dual-capable aircraft." Thus, as Mr. Slocombe told the Committee, "it is simply false to suggest that without them (i.e. the Pershing II), NATO will lack the means to attack Soviet forces and Soviet territory with nuclear weapons." Given the formidable array of nuclear forces that will remain in Europe after the INF Treaty takes effect, the Committee believes that NATO can continue to meet the requirements of flexible response.

Another problem with General Rogers' criticism of the INF Treaty is that it dismisses the important deterrent capabilities of the 400 SLBM warheads assigned to NATO. Like the Pershing II, these missiles can accurately strike targets deep in the Soviet Union. General Rogers has argued that NATO cannot credibly threaten to use these weapons because the Soviet Union would be unable to distinguish an attack from NATO-dedicated SLBM's from an attack initiated with the SLBM's in the U.S. strategic force. Thus, the argument goes, the Soviet Union might believe a full scale strategic attack was underway, rather than a more "limited" attack with NATO dedicated weapons.

But as Mr. Slocombe, Mr. Perle, and Ambassador Dean pointed out, this argument stands the problem on its head. Whether a strike is considered "limited" will depend on the number and type of targets hit, not on the geographic location of a delivery vehicle used to strike those targets. There is no reason why the Soviets should consider a strike on identical targets more "limited" because Pershing II's were used rather than SLBM's. The argument also contains a second questionable presumption. It assumes that faced with a "limited" Pershing II attack, the Soviet Union would respond with restraint and refrain from all-out escalation to strategic nuclear war. However, it is not at all clear why the Soviets would respond to a "limited" Pershing II attack any differently than they would respond to a "limited" attack with any other type of nuclear weapon. Soviet leaders have explicitly stated that an attack on their territory, limited or not, will be treated as a strategic nuclear attack. It makes little difference to the Soviets that the "limited" attack was conducted with Pershing II missiles based in Europe rather than NATO-dedicated SLBM's based in the North Atlantic or strategic forces based in the United States. As Mr. Slocombe told the Committee, "the idea that it makes a great deal of difference to the Russians where the bombs that hit them came from is a peculiarly Western notion; it is clearly not a Soviet one."

The INF Treaty and the U.S. Commitment to European Security.—While General Rogers fears that the INF Treaty will weaken the credibility of NATO's deterrent in Soviet eyes, former U.S. Ambassador to France Evan Galbraith told the Committee it will weaken the credibility of the American commitment to Europe in European eyes. According to Ambassador Galbraith, the Pershing II deployments restored the American nuclear umbrella and "reinforced the will of the Europeans to maintain an effective military force against the Soviet Union." Ambassador Galbraith goes on to argue that "with this Treaty we are on our way to withdrawing" the American nuclear guarantee and "the Europeans' lost faith in the American nuclear umbrella has given rise to defeatism, appeasement, and a longing to opt out * * * The INF Treaty sets us on a slippery slope and we won't stop sliding until Germany is denuclearized, neutralized, and demilitarized."

The Committee finds these arguments unpersuasive. The American nuclear guarantee to Europe does not hinge on any single weapons system, but on the close security, political, economic, and social bonds that tie us together. The American commitment of troops and resources to Europe are the manifestations of these strong bonds. Over 325,000 American military personnel stationed in Europe stand in the path of any Soviet attack and guarantee that such an attack would risk igniting a world war. These forces are backed up by U.S. strategic forces—the ultimate guarantor of Western security.

American forces in Europe reflect a recognition, growing out of two World Wars, that we can and must do all that is necessary to help maintain the peace and security of Europe; that the defense of the United States is intimately connected with stability in Europe; and that the future outbreak of aggression in Europe would inevitably involve the United States. This was the understanding that gave birth to the Alliance in 1949 and keeps it alive today. Europe remains at the center of U.S.-Soviet confrontation. The Central front in Europe is the front line of American defense; and that is why an attack on Western Europe is considered an attack on the United States. So long as these divisions exist—and there is no sign they will disappear anytime in the foreseeable future—the U.S. will have a vital interest in continuing to commit military power to European security. So vital is this interest that the United States could not afford to leave the defense of Europe in the hands of Europeans alone. That is the lesson we have learned from our involvement in two World Wars. To suggest that the elimination of 859 U.S. missiles in exchange for the elimination of 1,752 Soviet missiles represents a weakening of the American commitment is to misunderstand the entire basis of that commitment.

Nor is there any evidence to suggest that our European allies believe the INF Treaty represents such a weakening. Every leader in NATO has endorsed the Treaty. The NATO Defense and Foreign Ministers met after the December 1987 signing of the INF Treaty and gave it their full support. As the Foreign Ministers said, the INF Treaty "is fully consistent with the security requirements of the Alliance. It accomplishes an important and longstanding Alliance objective: the elimination of a class of Soviet nuclear weapons threatening the European allies and other regions of the world."

Thus, far from weakening the Alliance, the INF Treaty has strengthened it. Unlike the far-reaching proposals which were discussed at the October 1986 Reykjavik summit without any allied consultation, the initiation and implementation of the "double-track" strategy has been a united Alliance endeavor. It has demonstrated that with resolve and solidarity NATO can accomplish its objectives.

The Committee is confident that our European allies recognize that the Alliance is held together by more than a single class of nuclear weapons. Western Europe was not about to disarm and neutralize itself before the Pershing II's were deployed, and it is not about to do so once they are gone. To suggest that our European allies, and West Germany in particular, are on the verge of going neutralist, is to discredit their commitment to democratic values and their willingness to defend those values.

Some overlook the fact that West Germany, a country the size of the State of Oregon, not only fields the biggest army in Central Europe—500,000 men—but hosts 400,000 foreign troops, along with several thousand nuclear warheads on its soil. It permits foreign forces to maneuver throughout the country. It permits seven different air forces to fly at very low levels over its territory. And as Ambassador Burt underscored in his testimony, the key to the success of the INF process was the political courage demonstrated by the Germans in 1983 when they cooperated in the U.S. deployment of INF missiles on their soil. Given these realities, the Committee supports Ambassador Burt's further observation that "talking about neutralism, denuclearization, and appeasement is an affront to European governments and to an ally that has been prepared, time after time, to make very real sacrifices in a situation which is really unique."

The Future of the U.S. Security Guarantee.—While the INF Treaty and other U.S. Defense programs have bolstered West European confidence in the U.S. security guarantee, other recent U.S. actions have caused disquiet in Western Europe. As former Secretaries of Defense Harold Brown and James Schlesinger told the Committee, the most significant of these events was the October 1986 Reagan-Gorbachev summit in Reykjavik. The far-reaching arms reduction proposals tabled by President Reagan and General Secretary Gorbachev, without any prior consultation with our NATO allies, jolted the confidence of our Alliance partners in the steadiness of the American commitment to European defense. As Dr. Schlesinger said in his testimony, the Reykjavik summit dealt a "blow to allied confidence in American leadership and American understanding of the underpinnings of Alliance strategy." The Reykjavik summit seemed to confirm long latent fears that the two superpowers were prepared to reach a "consortium" between themselves on the shape of the nuclear world—a decision with serious implications for the Europeans, but one in which they would not participate. For the French, in particular, Reykjavik was taken as a vindication of their historic suspicion of heavy European dependence on the United States.

The erosion of European confidence in the American commitment to Europe has been further aggravated by the following factors: The President's surprise 1983 SDI announcement, talk of cutting U.S. troop levels in Europe, and the recent publication of the Pentagon-commissioned report entitled "Discriminate Deterrence." Many Europeans view SDI as a step toward "decoupling" the U.S. from Europe since from the European perspective, in a world where the superpowers could defend themselves from nuclear attack, the chances of an outbreak of conventional war in Europe would increase. Europeans also fear that the budget crunch and renewed attention to the burden-sharing issue in the U.S. will precipitate the withdrawal of American troops from Europe. As Mr. Francois Fillon, President of the Committee on Defense of the National Assembly of France told the Committee, "the reduction of the budget deficit, with its possible repercussions on troop levels stationed in Europe" could precipitate a "delinking process between Europe and the United States." Finally, the January 1988 release of the "Discriminate Deterrence" report has reinforced European fears that the United States would like to confine any future nuclear conflict to the European theater. The report recommends that the Alliance abandon the notion that the principal purpose of its nuclear arsenal in Europe is to link a Soviet conventional attack in Europe to strategic nuclear war between the superpowers. Instead, the report argues, NATO should use its nuclear force for selective warfighting purposes in Europe.

As Mr. Karsten Voigt, a member of the West German Bundestag told the Committee, "criticism of the concept of discriminate deterrence comes from all parties represented in the Bundestag. This criticism is unequivocal and unanimous. The concept runs counter to the interest of West Europeans in general and to those of the Federal Republic of Germany in particular." As the Economist reported, "this is precisely what European worriers have all along accused America of wanting to do, and precisely what two generations of NATO statesmen have tried to fashion alliance strategy to avoid." Senator Byrd, who led a Senate delegation to Europe in February, also found the report has created concern in NATO capitals. As he told the Committee, "the delegation downplayed the importance of the document, but the level of attention it has been getting in Europe is disturbing." The Committee believes that existing NATO strategy remains viable and should not be tinkered with. Furthermore, there should be no unilateral revision of strategies that affect the collective security of the Alliance. Thus, the "Discriminate Deterrence" report, which was prepared by private consultants, does not, and should not, reflect the official views of the U.S. Government.

These events—the Reykjavik summit, the surprise SDI announcement, threats of troop withdrawals, and the "Discriminate Deterrence" report—have all unsettled our allies. Many of the problems spawned by these events could have been avoided if the United States had consulted with its NATO partners before taking steps that have implications for their security as well as ours. Failure to do so can damage the trust that keeps the Alliance together. The INF experience stands in stark contrast to these events. From start to finish the United States and its NATO partners made and implemented the INF strategy in unison. The lessons from that experience should guide the Alliance as it confronts the challenges ahead.

Alliance Security in the Future.—Just as the Alliance has had to make sacrifices to protect freedom and democracy in the past, it will continue to have to do so in the future. The INF Treaty has strengthened Alliance security and solidarity, but much remains to be done. NATO has helped keep the peace by maintaining a strong deterrent force of conventional and nuclear weapons. The INF Treaty will in no way diminish the need to maintain and modernize those forces. Just as the INF Treaty does not create any new defense requirements for the Alliance, it will not make old problems disappear.

Secretary Shultz, Secretary Carlucci, the Joint Chiefs of Staff, and General Galvin all told the Committee that the INF Treaty did not generate any new defense requirements and explicitly stated that their support for the Treaty was not conditioned on any future actions. At the same time, they stressed the importance of following through with modernization efforts that would be needed even if the INF Treaty did not exist. The Committee supports this position. The Committee believes that the INF Treaty stands on its own, and it opposes all efforts to link approval of the Treaty to defense programs or modernization efforts. But the Committee believes it is essential that NATO continue to take the modernization steps that are necessary to maintain a viable deterrent. The next section takes a closer look at the military balance and NATO force modernization.

2. Modernization

a. Nuclear Modernization

During the course of its hearings, the Committee explored in detail a number of issues regarding future NATO nuclear modernization. These questions were carefully addressed:

> Does the Treaty create any new requirement for nuclear modernization?
>
> Does the Treaty restrict in any way the right of NATO to pursue plans for modernization of nuclear forces not specifically banned by the Treaty?
>
> Do the Soviets understand that NATO remains free to modernize forces not specifically covered by the Treaty?

The current NATO modernization plan dates back to 1983, prior to the initiation of INF missile deployments in Europe, when NATO defense ministers met in Montebello, Canada and agreed both to cut NATO's nuclear stockpile by 1,400 nuclear weapons and to modernize the remaining stockpile. General Galvin told the Committee that the Montebello communique listed general areas for modernization and that "a substantial amount of modernization has taken place as a result of Montebello." He specifically cited the upgrading of NATO's dual-capable aircraft and the deployment of a new artillery shell.

In the aftermath of the signing of the INF Treaty in December, there has been heated public discussion on the question of modernization, with some taking the view that there should be an immediate commitment to the modernization of specific systems, while others have taken the view that NATO should proceed steadfastly, but on the basis of further study, with modernization programs. The controversy was temporarily defused at the March 1988 NATO summit in Brussels. The final communique of that meeting declared that NATO will continue to pursue a "strategy of deterrence based upon an appropriate mix of adequate and effective nuclear and conventional forces, which will continue to be kept up to date where necessary." The communique reflects NATO's determination to take whatever steps are necessary to maintain a credible nuclear deterrent force, without demanding that West Germany immediately commit itself to specific programs.

In the view of most Members, plans for further NATO modernization should be made with the eventual possibility of further reductions in mind. The Committee supports Chancellor Kohl in rejecting the Soviet proposal for agreement on a "triple zero" approach, which would also eliminate the shortest range missiles. However, as indicated in the March 1988 NATO summit communique, it may be in the interest of the Alliance to work toward further agreed reductions in theater nuclear weapons in the context of improvements in the conventional balance. At this juncture, it is clear that first priority in arms control negotiations regarding Europe should be the achievement of a strong, comprehensive agreement to reduce the conventional forces threat posed by the Warsaw Pact. Once the shape of such an agreement is clear, NATO will be in a much better position to determine which additional reductions in the nuclear forces of both sides are desirable and achievable.

These decisions should be taken against the background of the improvement in Allied security which will accrue as a result of the INF Treaty. As Secretary of State Shultz told the Committee:

> NATO will retain a broad spectrum of theater and strategic nuclear capabilities, able to hold at risk targets throughout the Warsaw Pact. These include nuclear weapons on a variety of U.S. and allied delivery systems, and U.S. strategic systems assigned to SACEUR. UK and French forces are also present and provide an additional nuclear response from Western Europe to the Soviet Union. Moreover, althougth NATO is giving up a significant military capability, the Soviets are giving up a greater capability involving deployed missiles and launchers capable of carrying about four times more warheads than NATO. With the elimination of the SS-20 and SS-4 systems, Soviet ability to strike deep, time-urgent targets in NATO will be reduced. Coupled with the reduced threat against NATO seaports, airfields and U.S. POMCUS sites from nuclear/conventional/chemical-capable Soviet shorter-range missile systems, the reduced Soviet INF threat will increase the sustainability and survivability of our forces.

It is clear that the INF Treaty does not create any new requirement for nuclear modernization. Among other witnesses, the nation's paramount military authorities, the Joint Chiefs of Staff were questioned closely on this point. Having determined that the chairman and the four service chiefs independently support the Treaty without reservation, the Committee further ascertained that, although all the chiefs strongly support continued nuclear modernization, they consider it to be a separate issue and support the Treaty without a direct requirement for modernization.

General Larry D. Welch, the Air Force Chief of Staff, told the Committee that "the Treaty does not create the need for modernization, nor does it obviate it." General Carl E. Vuono, Army Chief of Staff, told the Committee, "Let me say that my support of the Treaty is not contingent upon modernization. However, the modernization of our conventional forces and our tactical and strategic nuclear forces is critical."

The Committee concurs that it is essential that NATO continue to take steps to maintain a viable deterrent. However, NATO should not rush ahead with new nuclear systems to compensate for an imagined void created by the INF Treaty, since rather than open a window of vulnerability, the Treaty has improved NATO's deterrent posture. To do so would create the erroneous impression that the United States and its Allies are not serious about reducing the nuclear threat in Western Europe. Such a false impression will be avoided if the United States and its Allies demonstrate both resolve and prudence in their decisions affecting what was described by Admiral Crowe as "the most militarized region in the world."

Whatever decisions are made on modernization, the Committee wishes to emphasize that the Treaty does not restrict in any way the right of NATO to pursue plans for modernization of nuclear forces not specifically banned by the Treaty.

b. Implications of Article XIV

Article XIV of the Treaty records the Parties' undertaking to comply with the Treaty and not to assume any international obligations or undertakings that would conflict with the provisions of the Treaty.

Ambassador Glitman told the Committee that the Soviets sought up until the final days of the negotiations to include language in the Treaty "which they hoped would serve as either a brake on U.S.-NATO cooperation, or at least as a basis for public accusations that we were not in compliance with the Treaty." That effort was successfully resisted, he told the Committee.

The Soviets had sought language which would have provided that each Party undertake not to circumvent the provisions of the Treaty in any manner, and they specified that this would include a prohibition on the transfer of intermediate-range missiles, launchers, components of such missiles, and technical documentation. The U.S. opposed inclusion of noncircumvention language, but indicated it could accept a restatement of international law. Ambassador Glitman indicated that, when the Soviets dropped their request for noncircumvention language, they continued to seek language to the effect that the parties would not take any action through any state or states or otherwise which would conflict with the Treaty. The U.S. argued that the language was too general and designed to provide a basis for the Soviets to seek to interfere with NATO cooperation, including modernization of forces. In the end, the Soviets agreed to drop all references to noncircumvention and to other states. They pressed for language stating that the Parties would not undertake obligations contrary to its provisions, which would include "actions or activities." According to Ambassador Glitman, the U.S. argued that "actions and activities" was too vague, and suggested "undertakings" in the sense of a formal agreement. The Soviets accepted.

In short, Ambassador Glitman affirmed to the Committee:

> The language of Article XIV and the negotiating record support the conclusion that this article, as finally agreed, does not in any way constitute a noncircumvention provision nor impose any additional obligations on the Parties, nor interfere with any existing program of cooperation with our Allies, nor interfere with any provision by the United States to its Allies of any items not limited by the Treaty.

As a result, Ambassador Glitman indicated, the INF Treaty will prohibit the United States from "producing or transferring a missile, missile stage, or launcher for a Treaty-limited GLCM or GLBM." This prohibition is part of the Treaty's basic obligations and would apply with or without Article XIV. Ambassador Glitman assured the Committee that transfer of missile components, other than launchers, missiles, or stages, is permitted under the Treaty. He cited as examples "the production or transfer of lesser components (including guidance elements), technology, or blueprints."

The Committee wishes to make it absolutely clear that, in its view, the transfer or production of these lesser components cited by Ambassador Glitman are fully consistent with both the letter and the spirit of the INF Treaty. If the Soviet Union were in the future to make contrary claims, the Committee would regard them as unpersuasive and without any justification deriving from the Treaty.

Confirmation that the Soviets did not succeed in restricting cooperation and modernization was provided on February 9 by Foreign Minister Eduard Shevardnadze in an address to the Foreign Affairs Commissions of the USSR Supreme Soviet Council of the Union and Council of Nationalities. In answer to a question as to NATO's right to create additional nuclear potential through the buildup of weapons not covered by the Treaty as compensation for the required eliminations, Mr. Shevardnadze said:

> * * * There is indeed a lot being said just now about compensation, about creating modernization, and so on, and this undoubtedly does give serious cause for concern, and it also gives our allies cause for concern. I said in my speech that it is now very important to maintain dynamism, not to permit significant pauses in problems of disarmament. If serious intervals were allowed, quite unexpected developments of events would be possible. Therefore, the Treaty itself does not give such a guarantee, but it creates good conditions to achieve progress and achieve the reductions of weapons in other fields, too.

c. Conventional Force Modernization

Just as the INF Treaty will not create new requirements for nuclear modernization, it will not generate additional requirements for conventional force modernization. When General Galvin (SACEUR) testified before the Committee he was asked whether the INF Treaty would require NATO to take any previously unplanned steps to strengthen its conventional forces. General Galvin replied, "No, I do not think it will force any unplanned steps. In fact, what I am concerned about is that planned steps might not be taken." Thus, while the Treaty will not create new requirements for conventional force improvements, it will not make old requirements disappear.

Because the Treaty itself will not increase the need for conventional force improvements, the Committee resisted and will continue to resist efforts to condition Senate consent to the Treaty on such improvements. The INF Treaty was never intended to address the conventional force balance issue and there is no reason to link the two at this time. In fact, the United States consistently rejected Soviet efforts to link the INF Treaty to other areas, such as the Nuclear and Space Talks. If the U.S. suddenly links the Treaty to conventional force issues, the Soviets are likely to renew their earlier demands for linkage to other areas. While the Committee strongly endorses the effort to negotiate reductions in conventional forces, the INF Treaty should not be held hostage to those negotiations. If the United States refuses to sign any agreement until it gets every agreement it wants, the most likely result will be no agreement. As Admiral Crowe told the Committee, "these treaties should stand on their own merit. Stand or fall on their own merit."

During the Committee mark-up, Senator Pressler introduced amendments and conditions that would prevent the Treaty from going into effect until parity existed between NATO and Warsaw Pact conventional forces. These efforts were overwhelmingly defeated. As Secretary Shultz said when asked for his views on such an amendment, "I think that would be a terrible thing for the Senate to do. That would be an amendment designed to ditch the Treaty." During the Committee mark-up, Senator Pressler argued that his amendment would not kill the Treaty because a conventional arms reduction agreement "could be reached very quickly." In his testimony, Admiral Crowe presented a different view. He stated that a conventional arms reduction agreement "would be a matter of tremendous complexity to negotiate over a long period of time" and that an amendment linking the INF Treaty to the conventional balance "would hold up the INF Treaty." Secretary Carlucci argued that "to tie it (i.e. the INF Treaty) in some way to these extraordinarily complex, albeit desirable, conventional negotiations would, in my judgment, be a killer amendment." General Welch, Air Force Chief of Staff had a similar reaction to such linkage. He said, "I think it would be unwise * * * I see no merit to complicating the process or delaying the Treaty in hope of a breakthrough" in the conventional arms reduction talks.

The Committee also rejected another amendment offered by Senator Pressler which made Senate support for the Treaty contingent on a presidential certification that the security of U.S. and NATO military personnel stationed in Europe is not in jeopardy. The Committee determined that whatever the current security situation in Europe is, the INF Treaty will not make that situation worse. The Committee is confident that the President would not have submitted the Treaty to the Senate if he believed it would increase the danger to U.S. troops and their dependents in Europe. Indeed, the Joint Chiefs of Staff told the Committee that the Treaty would strengthen NATO security. As Admiral Crowe told the Committee, "the balance we are seeing with the implementation of the INF Treaty is better than the one when it started." Given this assessment, the Committee concluded that the INF Treaty can only improve the security of American personnel in Europe.

While the INF Treaty has modestly improved NATO security, it will not eliminate the need for previously planned NATO force improvements. As General Vuono, Chief of Staff of the Army, told the Committee, "the requirements for modernization of the force were there before the INF Treaty, and they are there now." Making these conventional force improvements will require much greater defense cooperation among NATO's member states. As Senator Nunn observed in his testimony to the Committee, "NATO dissipates a large portion of its defense expenditures into national systems that are often duplicated, non-standardized, and in some cases not even interoperable with other allied systems." Because of these problems, Secretary Shultz told the Committee that "what we are trying to do in NATO is not so much to spend more money as it is to spend our money more wisely and effectively."

While NATO must spend its money more wisely and take the steps necessary to improve its conventional forces, NATO's conventional strength should not be underrated. As General Galvin told the Committee, in recent years "there has been a substantial increase in the capabilities of conventional forces * * * on the ground, in the air, and at sea." And, as General Glenn Otis, Commander-in-Chief of the U.S. Army in Europe, has stated, "with the total NATO capability available to Central Army Group, the first echelon of the Soviet forces is going to have a whale of a time doing anything to us." In addition, as Senator Nunn told the Committee, "the outcome of a conventional war depends on many unknowns: The relative performance of competing weapon systems; the quality of personnel; training; leadership; and morale to name a few." The Soviet Union must also face the possibility that its disaffected East European allies would disrupt, not support, a Soviet attack on the West.

Given these uncertainties, a Soviet attack on Western Europe would entail huge risks. Nevertheless, NATO must continue to take the steps necessary to improve the NATO-Warsaw Pact conventional balance. There are two ways to accomplish this objective—through unilateral NATO force modernization efforts and conventional arms reduction agreements. The Committee believes that NATO should pursue both paths. As the INF experience demonstrated, force modernization efforts can complement arms control efforts.

Given the probable difficulty of reaching early agreement on conventional arms reductions, the Committee believes NATO and the Warsaw Pact should explore the possibility of placing interim restrictions on military activities and deployments in the European theater. Interim constraints could ease tensions caused by imbalances in the conventional forces of the two alliances while the longer-term negotiations proceed. Such constraints might include a mutual pullback of major ammunition, fuel storage depots, and particular types of units to agreed distances from the intra-German border. They might also include the establishment of risk reduction centers to deal with low-level incidents between the alliances. These possibilities should be explored in the context of the upcoming Conventional Stability Talks.

In conclusion, the Committee believes that NATO must continue to take steps to reduce Soviet advantages in conventional forces through force modernization and arms control. These efforts were underway before the INF Treaty was signed and should continue unabated. The INF Treaty has neither increased nor diminished the need for such efforts. Therefore, the Committee believes that support for the INF Treaty should not be linked in anyway to improvements in the NATO-Warsaw Pact conventional force balance. As the Joint Chiefs of Staff told the Committee, the INF Treaty deserves to be supported on its own merits.

3. Circumvention Through Strategic Forces

The missiles to be eliminated under the INF Treaty are those having ranges between 500 and 5,500 kilometers. Strategic forces—those with ranges above 5,500 kilometers—are not limited, either by the INF Treaty or by any other superpower agreement now in effect.

During the Committee's hearings, several Members expressed concern that the Soviet Union could, with strategic forces, circumvent the INF Treaty militarily either by re-targeting existing strategic forces on Europe and Asia or by adding new strategic forces for the same purpose.

Members expressed varying degrees of concern about this problem. Senator Helms, for example, warned that the SS-25, a single-warhead mobile ICBM that will not be limited by the INF Treaty, has the same capacity to strike European targets as the SS-20. Senator Biden commented that Senator Helms was "making the strongest argument that could be made on the need to have an agreement that we [the Soviet Union and the United States] would be bound by SALT limitations on strategic nuclear delivery vehicles."

In response to these concerns, Ambassador Glitman argued that while SS-25's and other strategic missiles could indeed be used to circumvent the INF Treaty militarily (just as could U.S. strategic weapons), they could not serve the same *political* function as the SS-20's. The main value of the SS-20 for the Soviets "was that it allowed them in effect to hold Europe hostage in a way that the SS-25's would not." Whereas most SS-20's were definitely targeted on Europe, the NATO allies would not know the intended targets of the SS-25 or other strategic-range weapons. Thus, once INF missiles were eliminated, the United States and its Allies would jointly face, at least perceptually, a common nuclear threat.

Possibility of an Interim Regime.—During the Committee hearings, several Members pointed out that from 1979 until 1986 the superpowers pledges to adhere to the limits of SALT I and II, a regime which resulted in the reduction of hundreds of launchers, mostly on the Soviet side. However, with the United States having repudiated and exceeded the SALT I and II limits and exceeded one of the key SALT II sub-limits, the possibility exists of substantial Soviet growth above current levels of key strategic systems. While such growth may appear unlikely in the current climate, some Members expressed concern that the possibility cannot be discounted. The Soviets have major missile and bomber programs underway, which if unaccompanied by dismantlement of existing systems would:

(*a*) significantly increase the strategic nuclear threat to the United States; and

(*b*) undercut the military significance of the INF Treaty by facilitating Soviet targeting of strategic systems on Europe

Secretary Carlucci acknowledged this problem during testimony, saying that the Soviets can legally increase the number of its strategic forces and that "numerical increases would heighten the threat." But this, Secretary Carlucci added, is not a problem the INF Treaty was designed to address.

With a view to dealing with the general problem of unconstrained strategic forces, and the specific problem of potential INF Treaty circumvention through strategic forces, Senators Biden, Cranston, and Kerry repeatedly questioned Administration witnesses as to the advisability of establishing formally or informally, a regime of interim strategic restraint. The regime contemplated was one in which the Soviet Union and the United States would not increase their strategic forces beyond existing levels. Since the United States does not now plan any significant increase in the overall number of its strategic nuclear delivery vehicles or the number of its MIRVed ballistic missiles, such a policy could be implemented without detriment to U.S. strategic programs and with the benefit—potentially a very significant benefit if a START agreement is not imminent—of maintaining some limit on Soviet forces.

Under questioning, both Secretary Carlucci and Ambassador Nitze testified that the United States can adequately verify the number of Soviet strategic nuclear delivery vehicles and the maximum number of Soviet ballistic missile warheads—the implication being that the United States could in fact verify compliance with a regime of interim strategic restraint.

Administration witnesses stated opposition to any such regime, however, arguing that the United States should deal with strategic forces by focusing all energy on the START negotiations. An interim regime, according to the Administration, would not only lack binding effect but could also actually delay completion of a START agreement by diverting attention and by removing a sense of urgency.

While some Committee members remained unpersuaded by the Administration's argument against a regime of interim strategic restraint, the Committee notes that such a regime has, to a large extent, already, been placed into effect by congressional initiative in the FY 88-89 National Defense Authorization Act, the conference report of which stated as follows:

> The Conferees believe that maintaining interim restraint in strategic offensive force levels is not only prudent in light of current budget realities, but also consistent with the recent progress in the START negotiations and the continuing Soviet practice of retiring older ICBM's and SLBM's prior to the end of their normal service life. Assuming that progress continues to be made in START and that the Soviet Union continues early retirements of ICBM's and SLBM's, it would be the intent of the conferees to take such actions as may be required to maintain U.S. and Soviet interim restraint, including the option of foregoing the overhaul of additional Poseidon-class submarines nearing the end of their normal service lives.

Testing a Missile over 5,500 kilometers for an INF Force.—During the Committee's hearing, questions were also raised about the possibility that the Soviets could test a missile once at a range over 5,500 kilometers—establishing it in the ICBM category—and then test and deploy it for use as an INF missile. Administration witnesses confirmed to the Committee that the INF Treaty does not prohibit such a possibility. In the Committee's view, this issue simply reflects the indisputed fact that ICBM's can be used at shorter range.

In analyzing a Soviet missile, U.S. analysts categorize the weapon according to its maximum range. But it should be noted that ICBM's are often—indeed usually—tested at ranges well below 5,500 kilometers. Thus, there are two ways in which a Soviet missile with strategic range could come to be perceived in the West as "an INF missile disguised as an ICBM":

First, Western governments could decide to label a Soviet missile as such—something which can now be done to any Soviet ICBM, since all are tested frequently at ranges below 5,500 kilometers.

Second, the Soviets could decide to advertise that they were systematically testing a strategic-range missile at intermediate-ranges in order to be able to target it as such.

In neither case would there be a technical violation of the Treaty. The first case would represent a U.S. decision to allege, disingenuously, that the Soviets were violating the spirit of the INF Treaty. Moreover, since the United States also tests its strategic missiles at ranges below 5,500 kilometers, we would be vulnerable to the same charge by the Soviet Union. The second case would represent a highly unlikely Soviet decision to boast of violating the spirit of the Treaty—an improbable decision that would surely cost Moscow more than it could hope to gain. In addition, testing a strategic missile at intermediate ranges does not alter the fact that such a missile is not uniquely targetable against Western Europe. As long as the missile is capable of striking the United States as well as Western Europe, a U.S. interest in reducing such missiles in START is assured.

The Committee determined that this particular variant of the circumvention issue did not necessitate Senate action.

A related issue is whether a missile tested once at strategic range can be "reconfigured," then tested at INF range, and still not be covered by the INF Treaty. The Administration has told the Committee that the United States will be in a position to challenge the Soviet Union in the event a missile tested once at strategic range is "reconfigured." In a letter to Chairman Pell, Ambassador Kampelman further argued that "we do not want to be specific on the factors that would be taken into consideration in making such a determination. In any event, any U.S. challenges would be undertaken on a case-by-case basis. A case-by-case approach would ensure maximum flexibility to challenge Soviet actions. In the Committee's view, the Administration's approach is sound.

In an effort to prevent circumvention of the INF Treaty through missiles tested at strategic range, Senator Helms proposed an amendment to prohibit flight-testing of any missile at ranges between 500 and 5,000 kilometers. By a vote of 14-2, the Committee rejected this amendment. In the Committee's view, such an amendment would alter the basic obligations of the INF Treaty. It would directly affect flight-testing of strategic missiles, since both the United States and the Soviet Union regularly test strategic missiles at INF ranges.

However, as noted previously, some members were deeply concerned by the absence of limits on strategic forces and by the potential for circumvention of the INF Treaty through strategic forces. This issue underscores the need for a START agreement in order for the INF Treaty's potential to be realized.

V. VERIFICATION AND COMPLIANCE

A. BACKGROUND

The new INF Treaty includes a number of precedent-setting on-site monitoring procedures, including continuous monitoring of specified production facilities, as well as inspection of missile deployment, storage, and elimination areas. There are also a number of cooperative arrangements, including provisions for "challenge" inspections for a period of 13 years. On-site inspections have been provided for only once before in a bilateral agreement with the Soviets—in the unratified 1976 Peaceful Nuclear Explosions Treaty, and those inspection provisions have never been triggered.

The data exchanges required in connection with the Treaty are detailed and comprehensive. The specifics set forth in the Memorandum of Understanding are particularly striking against the background of earlier arms control agreements. In 1972, in SALT I, the Soviets were most reluctant to be forthcoming. They declined, among other things, even to provide their own names for the weapons covered by the Interim Agreement. In SALT II, the Soviets did provide nomenclature and deployment totals for their systems, but provided nothing on characteristics. In connection with the INF agreement, the Soviets have provided names, specifications, and pictures of the covered weapons (albeit apparently with some reluctance) and locations of identified sites and facilities are specified.

These inspection provisions are augmented by National Technical Means (NTM), which is the term of art for various intelligence-collection means, as was the case in SALT I and SALT II.

B. EFFECTIVENESS OF VERIFICATION REGIME

As Secretary of State Shultz put it to the Committee, "There is no such thing as absolute or 100% verification. That would essentially be a case of proving a negative which is difficult if not impossible." The real question, then, is what level of risk will the United States be prepared to accept, or what "standard" should a verification regime be required to meet? The question of what standard for verification should be used has been at the heart of the debate over arms control for many years.

The clearest exposition of the verification standard applied by the Reagan Administration in negotiating and completing the INF Treaty—which the Administration calls "effective" verification—was provided by Ambassador Paul Nitze, in his testimony before the Committee. He said:

> What do we mean by effective verification? We mean that we want to be sure that, if the other side moves behond the limits of the Treaty in any militarily significant way, we would be able to detect such violation in time to respond effectively and thereby deny the other side the benefit of the violation.

The key term which defines the Administration's standard is the detection of "militarily significant" cheating. The Administration is not claiming that it can determine conclusively if the Soviet Union were to violate the Treaty in an "insignificant" way—for example, if the Soviets chose to maintain ten or twenty SS–20 missiles in storage. Indeed, Secretary Shultz told the Committee, "We can never know for certain that a banned missile is not concealed somewhere in the Soviet Union." And General Larry D. Welch, Air Force Chief of Staff, explained to the Committee that "We cannot guarantee that small numbers of missiles will not be concealed."

Detecting Militarily Significant Violations.—After defining the appropriate standard, of course, the critical question is whether the combination of U.S. national technical means of verification and the procedures established in the INF Treaty are sufficient to detect militarily significant violations in time to respond effectively. Secretary of Defense Carlucci testified that the standard of "effective verification" will be met by the verification provisions in the INF Treaty. As he put it:

> The prohibition of flight-testing, the production ban, and geographic constraints will make it difficult for the Soviet Union to deploy a militarily-significant covert force of the INF missiles. Should the Soviets still elect to violate the Treaty, this will prove costly, complicated, and—we believe—detectable before any *significant military threat to U.S. interests would arise.* (Emphasis added.)

General Welch explained that the verification provisions of the Treaty are sufficient—and meet the Administration's standard of "effective" verification. He testified that "We can over time monitor deployed systems maintained in any militarily useful posture." General Welch argued that development of a covert force by the Soviet Union would be very difficult, requiring an "elaborate hidden infrastructure." His conclusion was that if the Soviet Union chose to develop such a force, "they would run a high risk of detection over time."

Chairman of the Joint Chiefs of Staff, Admiral Crowe, concluded that the United States can meet this standard of "effective" verification. He explained that "the total web of all intelligence resources * * * provide high confidence that we can effectively assess and verify Soviet compliance with the Treaty as a whole."

Clearly, the verification provisions contained in the INF Treaty are the most elaborate ever contained in a U.S.-Soviet arms control agreement. The provisions are more than sufficient to meet the standard for verification set out by the Administration. U.S. ability to detect "militarily significant" Soviet cheating is primarily a result of the fact that the Treaty bans an entire class of missiles, rendering detection of militarily significant violations markedly easier.

Most of the witnesses testifying before the Committee emphasized that the ban on flight-testing of intermediate-range and shorter-range missiles is critical to our ability to detect a covert INF force before it becomes militarily significant. And the Secretary of Defense told the Committee, "We have high confidence that we can detect the flight test of an INF missile and distinguish it from the flight testing of other missiles." Since the United States can, by national technical means alone, detect flight-testing of Soviet missiles banned by the INF Treaty, we can verify the development of a militarily significant covert INF Force in a timely manner.

Soviet Incentives To Violate the INF Treaty.—In assessing the ability of the United States to detect militarily significant cheating, the Committee believes the strategic context within which the INF Treaty will occur should be taken into account. In the Committee's view, because of the limited military significance of the INF Treaty, the Soviet Union has little or no military incentive to cheat on this Treaty.

If either country so chooses, it can use existing or additional strategic forces to cover the targets currently covered by INF missiles. Such compensation for the INF Treaty would be far simpler, less costly, and less politically damaging than an extensive effort to develop a covert INF force. Secretary Carlucci explained why the current strategic environment limits Soviet incentives to cheat. He told the Committee: "If you are talking about a Soviet Union with 11,000 warheads in a non-START constrained atmosphere, obviously missiles carrying another 500 to 1,000 warheads are not all that significant."

Indeed, Chairman of the Joint Chiefs, Admiral Crowe argued that the Soviet Union, under General Secretary Gorbachev is unlikely to cheat on the INF Treaty in any event. He told the Committee:

> Suffice it to say, our discovery of cheating would run counter to everything General Secretary Gorbachev is trying to do in his public diplomacy, e.g., improve the Soviet image; revitalize the Soviet economy in cooperation with the West; and achieve more openness and candor in Soviet society. In this broader political context, cheating on the INF Treaty would be very risky business and involve extremely high stakes.

The Committee finds Admiral Crowe's argument very persuasive.

Verification Standards in Past Arms Control Agreements.—Previous arms control agreements have often been criticized precisely because of the verification standard applied to them. During the course of Senate consideration of the SALT II Treaty, many critics attacked the agreement on the grounds that verification of the agreement was insufficient. Other arms control agreements have also been criticized on verification grounds.

The Committee notes the similarity between the Reagan Administration's verification standard for the INF Treaty and the verification standard the Carter Administration sought to apply to SALT II. To repeat, Ambassador Nitze testified that "effective verification" means: "If the other side moves beyond the limits of the Treaty in any militarily significant way, we would be able to detect such violation in time to respond effectively and thereby deny the other side the benefit of the violation." As Senator Biden pointed out, this statement is "not dissimilar" to what Harold Brown said eight years ago with regard to the SALT II Treaty.

Indeed, in testimony before the Foreign Relations Committee in 1979, then Secretary of Defense Brown defined the Carter Administration's verification standard for SALT II in nearly identical terms. He testified that "any Soviet cheating which would pose a significant military risk or affect the strategic balance would be detected by our intelligence in time to respond effectively."

During the INF Treaty hearings, an exchange between Senator Pell and former Secretary of Defense Brown illustrated the similarity between the verification standard applied by the Carter Administration and the standard applied by the Reagan Administration.

> The CHAIRMAN. Do you see any difference between what [verification standard] the present Administration has advanced now, as opposed to what was enunciated by you during the SALT II hearings?
>
> Secretary BROWN. They use a different word. I think they use, what "effective" and we used "adequate" * * * But I don't think there is any operational difference between what the present Administration is talking about and what we meant."

The Administration has not been able to identify any meaningful difference between the term "adequate" verification used by the Carter Administration for SALT II and the term "effective" verification used by the Reagan Administration for the INF Treaty. When asked to comment about the similarity between the verification standard for SALT II and the standard for the INF Treaty, Secretary Shultz responded: "Since we are concerned with substance rather than semantics, our approach called for verification measures well beyond those found in previous arms control efforts."

Most members of the Committee do not believe this is a debate over "semantics." Deciding what verification standard should be applied to arms control agreements is a critical decision any Administration must make in entering into agreements with the Soviet Union which go to the heart of U.S. national security. The Administration established the right standard, it is the same standard used by the Carter Administration. The Committee believes that the verification procedures—extensive on-site inspections and numerous cooperative measures—contained in the INF Treaty certainly go far beyond past arms control agreements, and therefore more verification procedures have indeed been developed to meet the necessary verification standard.

It is the Committee's view that the verification standard established by the Reagan Administration—which is labelled as "effective" verification—is indeed the appropriate standard which should be applied to arms control agreements. It is not possible to detect all possible Soviet violations of the INF Treaty.

Establishing the criterion of "militarily significance" is what has enabled the United States to enter into arms control agreements with the Soviet Union in the past. It is the right criterion, and in the Committee's view U.S. national technical means and the verification procedures contained in the INF Treaty do meet that standard. The United States can detect militarily significant Soviet cheating in time to develop an effective response.

C. DATA BASE

The MOU submitted to the Senate with the INF Treaty contains information in unprecedented detail with regard to the forces covered by the Treaty. By contrast, the 1972 SALT II Interim Agreement and Anti-Ballistic Missile Treaty contained scant detail. At that time, the Soviets were unwilling to provide information on even the names of their systems, much less details on characteristics. In SALT II, the data exchanged by the two sides could be fitted on a page. In connection with the INF Treaty, both sides have provided detailed information on the numbers of deployed and non-deployed intermediate-range and shorter-range missiles and launchers, as well as the aggregate number of second stages. Technical data on each system were exchanged, together with photographs. Also listed are the locations of deployment areas, missile operating bases, and missile support facilities, as well as the numbers of missiles, launchers, support structures and support equipment at each location.

The data provided are to be updated as of the date of entry into force and at six-month intervals thereafter. The "net effect" of changes is to be described in connection with each six-month update.

Shortly after the treaty was signed, there were public allegations that there were errors in the information provided and that the Soviets had deliberately given a bad photograph of the SS-20 and its launcher and a possibly misleading photograph of the SS-23 and its launcher. In response to questions by the Chairman, the Administration indicated that, following a demarche, the Soviets provided an acceptable photograph of the SS-20 and explained a discrepancy between the photograph of the SS-23 and the provided data. The Administration indicates that it does not now dispute the authenticity of the photographs. With regard to the matter of errors, the Administration has indicated that, with the exception of the United States' failure to note a number of Pershing IA missile stages which were produced at, but never left, a facility in Marshall, Texas: "There were no substantive errors in the MOU." Questions were also raised about the number of non-deployed SS-20's as reflected in the MOU and differing intelligence estimates. This issue was examined in detail by the Committee, which found no conclusive evidence that the Soviets provided erroneous data. This matter is discussed fully in Section VI.

At the time of its markup of the Treaty, the Committee had no additional information available to it which cast doubt on the basic validity of the data. Should it turn out that there are other discrepancies, it will be important that both sides act expeditiously and in good faith to set the record straight. There will be ample opportunities to do so in the required data exchanges as well as in other communications through the Nuclear Risk Reduction Centers and the Special Verification Commission.

D. INSPECTIONS

1. Significance of Inspections

The INF Treaty contains the most comprehensive and intrusive verification regime ever established to monitor compliance with a U.S.-Soviet arms control agreement. Integral to the regime is on-site inspection (OSI), both within the United States and the Soviet Union and at U.S. and Soviet bases in Belgium, Italy, the Netherlands, the United Kingdom, West Germany, East Germany, and

Czechoslovakia. All facilities mentioned in the treaty except missile production facilities are subject to some form of OSI. Inspection guidelines, such as the rights and responsibilities of both parties in inspections and the rules for conducting them, are spelled out in the Protocol on Inspection.

Types of Inspections.—OSI is permitted for the first 13 years of the treaty's duration—that is, during the three-year elimination period and 10 years thereafter. Pursuant to Article XI, five types of inspections are permitted:

(1) Baseline Inspections. Between 30 and 90 days after the treaty takes effect, inspections will be conducted at all missile operating bases and support facilities specified in the MOU—including sites where missiles are stored and repaired but excluding missile production facilities--and at all elimination facilities to verify the number and location of all missiles, launchers, and other items to be destroyed.

(2) Inspections of Missiles and Launcher Elimination. Each party is permitted to have inspectors observe the actual destruction of the other party's missiles and launchers at elimination sites. Inspectors may also observe IRM's being launched to destruction.

(3) Close-out Inspections. Within 60 days after a given missile operating base or missile support facility (other than a missile production facility) is eliminated, close-out inspections will be conducted to verify that the process of destroying IRM's, SRM's, their launchers and support equipment has been completed.

(4) Short-notice "challenge" inspections. During the first three years after the treaty enters into force, each party will be permitted up to 20 short-notice inspections per calendar year at sites listed in the MOU (except elimination sites, which are subject to OSI during the actual dismantlement and destruction process, and production facilities). During the next five years, 15 inspections will be allowed annually, and during the final five years 10 annually. In any given year, no more than half of these inspections may occur in any one basing country other than the United States and the Soviet Union. For example, in any given year, the United States can conduct up to half of its permitted short-notice inspections in East Germany, but no more. Each side may demand an inspection and be admitted to a point of entry without specifying the particular site it wishes to see. The inspected party must provide transportation to the chosen site within nine hours of the inspectors' declaration of their destination. Inspectors may enter the country only via designated points of entry; Moscow or Irkutsk in the Soviet Union, and Washington, DC, or San Francisco in the United States.

(5) Inspections of Production Facilities. Thirty days after the treaty takes effect and for the duration of the 13-year period, the United States will have the right to station, 24 hours a day, up to 30 resident inspectors at the exits and around the perimeter of the Votkinsk Machine Building Plant, west of the Urals, where both the SS–20 IRM (covered by the Treaty) and the SS–25 ICBM (not covered by the Treaty) are assembled.

Since the SS–25 uses a stage which is outwardly similar to a stage of the SS–20 IRM, U.S. inspectors will monitor all vehicles and cargo which leave the plant to ensure that SS–20 production there has ceased. The Soviet Union will be permitted to monitor the portals of the Hercules Plant at Magna, Utah, which once produced boosters for the Pershing II missile. If, after two years, the final assembly of SS–25's at Votkinsk ceases for a 12-month period, neither party will have the right to monitor the other's production facility. If SS–25 assembly resumes there or elsewhere, inspection rights at the assembly facility would be permitted.

Role of Inspections.—While the verification regime established by the INF Treaty is clearly comprehensive and far-reaching, some Senators questioned how important a role the on-site inspections will play in protecting U.S. security from potential Soviet non-compliance with the INF treaty.

The verification regime for the INF Treaty has three principal functions: Establishing the inventory of INF missiles and related equipment to be eliminated, ensuring that these missiles and equipment are actually eliminated, and detecting a covert INF force. Inspections will play a role in each of these three functions.

Establishing the Inventory for Elimination.—As part of the required exchange of data, the Soviet Union will provide information regarding the quantity and location of Treaty-limited equipment. Initial data was provided prior to the signing of the Treaty, and a second set of data will be provided within thirty days after the entry into force of the Treaty. Baseline inspections by U.S. inspectors can confirm that the number and location of the missiles and equipment declared by the Soviet Union is correct, but not whether the declared number corresponds to the quantity of missiles and equipment actually in existence in the Soviet Union. Short-notice inspections at declared facilities, during the first three years following entry into force of the Treaty, will ensure that missiles or equipment have not been hidden prior to elimination. However, if the Soviet Union sought to store away missiles and did not include those missiles in the initial data, neither the baseline inspections nor the short-notice inspections will necessarily detect this type of non-compliance. To be sure, the fact that U.S. inspectors will be investigating facilities at which INF missiles have been located will provide a deterrent against such non-compliance.

Nevertheless, the United States cannot guarantee, through on-site inspections, the authenticity of the initial Soviet data. Nor can the United States guarantee, through on-site inspections, that the data provided by the Soviet Union after entry into force is authentic. Verification of the data supplied by the Soviet Union will depend, ultimately, on our intelligence assessments of Soviet INF missiles and equipment.

With regard to the initial data provided prior to the Treaty's signing, Secretary of State Shultz has testified to the Committee that "The data provided by the Soviet in the MOU fall generally within the bounds of U.S. intelligence community estimates." And Air Force Chief of Staff, General Welch, testified to the Committee that "the Soviet declaration of numbers of deployed systems falls within the range of U.S. estimates build up over years of such monitoring."

Verifying Elimination.—INF missiles and equipment will be destroyed at specified elimination facilities, under agreed procedures. U.S. inspectors are permitted to observe these eliminations. Furthermore, the United States may conduct close-out inspections to confirm that no illegal equipment remains at declared facilities and that all prohibited activities have ceased at those facilities. Clearly, these on-site inspections will be instrumental in ensuring that the required missiles and equipment actually will be eliminated. As General Welch put it, "We know we can verify that the Soviets destroy over 1,800 delivery systems identified by the Soviets * * *. We will also witness and can verify the elimination of the existing complexes of equipment, structures and facilities that support those systems." Therefore, on-site inspection will significantly enhance our confidence that INF systems have, in fact, been eliminated as required by the Treaty.

Detecting a Covert INF Force.—Two kinds of on-site inspections will play a role in detecting potential Soviet development and deployment of a covert INF force: Short-notice inspections and production monitoring. Production monitoring permits U.S. inspectors to monitor the Votkinsk Plant, the final assembly facility for SS-25 ICBM's. This monitoring will help to ensure that SS-20 missiles are not being covertly produced at this plant. Short-notice inspections are permitted for a period of ten years at all of the sites contained in the MOU. Such inspections will help ensure that the Soviet Union is not maintaining, or providing the base for an INF force at any of these locations.

However, if the Soviet Union were seeking to develop a convert INF force, in all likelihood it would not do so at the facilities where U.S. inspectors are permitted to go. Former Secretary of Defense James Schlesinger argued that short-notice inspections at declared facilities have limited value, because "There are 11 million square miles in the Soviet Union. If the Soviets wanted to cheat—and I have raised a question whether they are so motivated in this case—surely they would not cheat in the 20,000 square miles in which we have the right of inspection." Nor is the Soviet Union likely to produce INF missiles at the location where U.S. inspectors are permanently located. Of course, since the locations where inspections are permitted are the most suitable for an INF force, the mere fact that such inspections will occur raises the cost to the Soviet Union of potential non-compliance at other less-suitable locations. In the end, however, the critical question is: Can the United States detect Soviet non-compliance in areas where on-site inspection is not permitted?

In order to maintain a militarily useful covert INF force, the Soviet Union would have to maintain a concealed infrastructure for such a force and would have to conduct periodic flight-testing of the missiles. The Joint Chiefs told the Committee that the United States maintains "high confidence" that it can detect, through national technical means, illegal flight-testing of INF missiles. General Welch further testified that "in order to have any confidence that your missile force is a viable, ready force, it has to be exercised constantly. Your people must be trained constantly." Such exercise and training can also be detected, to some extent, through national technical means. In sum, the Joint Chiefs testified that if the Soviets were to develop a covert force, because of U.S. national technical means "they would run a high risk of detection over time."

For these reasons, the Committee concurs with the views of General Welch: "It is my conclusion that it is not practical for the Soviets to hide significant numbers of missiles in any useful state of readiness for a significant period of time." Ultimately, the United States will rely on national technical and other intelligence means to protect against Soviet non-compliance. Although short-notice inspections or production monitoring alone may not significantly enhance our ability to detect a covert INF force they will contribute to the strength of the overall verification regime.

The Issue of "Anywhere/Anytime" Inspections.—During the course of the Committee's hearings, some Senators expressed concern regarding the limited nature of the inspections. Some Senators questioned whether the United States should have insisted on the right to conduct on-site inspections on demand "anywhere" in the Soviet Union, not simply at the facilities listed in the MOU.

Since "anytime, anywhere" inspections would be reciprocal, the United States would have to be prepared to allow Soviet inspectors in any U.S. facility. The Reagan Administration decided that the United States could not tolerate the intrusive nature of "anytime, anywhere" inspections. Facilities as sensitive as NSA headquarters, CIA headquarters, and nuclear weapons fabrication facilities, etc., could have been subject to such inspections. Key U.S. agencies opposed these types of insections because of the potential for compromising sensitive U.S. facilities and information. Ambassador Glitman explained the dilemma as follows: "If you go to an anytime, anyplace approach, you have to be prepared to allow the other side to do that. And as we began to look at the situation, it became clear that we were not prepared to do so."

The Committee believes that the INF Treaty, in its current form, meets the Administration's standard of "effective verification." Given that the existing procedures are "effectively verifiable," the Committee can identify no compelling reason for seeking "anytime, anywhere" inspections, which the Executive branch has indicated could compromise key U.S. facilities. In the case of the INF Treaty, insisting upon inspections would permit an unwarranted pursuit of ever more verification to undermine genuine U.S. national security interests.

In sum, the Committee is satisfied with Secretary of State Shultz's response to this issue:

> It was the conclusion of the Administration that, in the context of the INF Treaty, "anytime, anywhere," inspections added little to the already extensive and unprecedented INF verification regime when balanced against the possible risks to other U.S. and Allied security interests which they raised.

Conclusion.—The Committee agrees with the Administration that the inspections create a synergistic effect which enhance the overall functioning of the verification regime and serve to deter potential Soviet cheating. The inspections will greatly enhance our confidence that Soviet missiles and associated equipment will indeed be eliminated. Further, the INF Treaty's on-site inspections could promote a desirable opening up of Soviet society which could ease superpower tensions.

However, in the Committee's view, on-site inspections will not improve significantly our ability to detect Soviet development of a covert INF force. Protection against such a contingency is provided by existing national technical means. As Secretary of Defense Carlucci told the Committee and Admiral Crowe reiterated, "National technical means comprise our principal capability for monitoring Soviet compliance with the INF Treaty." In short, on-site inspections, while helpful, are merely supplementary means.

2. Inspection Tasks

In response to a request from Chairman Pell, the Department of Defense provided the Committee with a report detailing its plans for implementing the inspection tasks required by the INF Treaty. An unclassified version of that report is contained in Part 5 of the Committee's hearings. The classified report is stored in the files of the Committee. Pending further inquiry into the Administration's implementation plans, the Committee reserves judgment on this issue. A summary of the DOD report follows.

The DOD Undersecretary for Acquisition is responsible for ensuring DOD compliance with all arms control agreements. In November 1987, the DOD identified the necessary planning steps for the Treaty. Each service and DOD agency was to develop plans consistent with the existing DOD compliance process, identify actions needed to comply with the elimination provisions, and begin the necessary preparations to be undertaken prior to entry into force to protect sensitive information at on-site inspection areas. The Secretary of the Air Force has responsibility for the elimination of the GLCM and associated items. The Secretary of the Army has similar responsibility for the Pershing IA and the Pershing II, and is the lead for the DOD environmental assessment of the Treaty.

On-Site Inspection Agency (OSIA).—The OSIA was formed to conduct the required inspections. It will conduct U.S. inspections of Soviet facilities, and will coordinate U.S. activities in conjunction with Soviet inspections. OSIA operates under guidance from the policy community mechanisms established under the NSC, and DOD will provide administrative support.

DOD established OSIA as a field operating activity. The OSIA director will report to the DOD Undersecretary for acquisition and, within DOD, OSIA receives guidance from an executive committee including the Undersecretaries of Defense for both acquisition and policy, and the Chairman of the JCS. To avoid the creation of a new support bureaucracy for OSIA, some support functions were tasked to other agencies, such as the Defense Nuclear Agency. This approach will allow for the timely, lowest-cost Treaty compliance and will integrate the implementing activities into the existing infrastructure.

OSIA responsibilities are acquiring, training, equipping, maintaining, and managing personnel and resources required to support U.S. inspections and to manage Soviet inspections. Some resources and personnel will be provided as needed by other agencies, and

OSIA will be responsible for the training and logistics support unique to the inspection mission.

OSIA will keep close contact with interested Executive departments and agencies including State, Energy, ACDA, and FBI. An ACDA representative is the OSIA Director's Principal Deputy, and State and FBI officers are OSIA Deputy Directors.

OSIA is designed with a full-time headquarters, including a Director, Principal Deputy, two Deputy Directors, a special staff, and a functionally organized staff. Actual inspections are to be managed by the Inspection division, which controls 20 teams of 10 persons each (majority on-call). From these inspectors will be drawn the U.S. elimination inspection teams. Escort for Soviet inspectors will be handled by the Escort Division (up to half on-call), which manages the point of entry teams in DC, San Francisco and Europe, as well as escort teams for Soviet inspections. A separate portal monitoring team for Votkinsk, and the escort team for Magna, Utah, will be established to oversee these continuous monitoring activities.

Nuclear Risk Reduction Centers.—NRRC's, established by the U.S. and USSR on September 15, 1987, will transmit and receive required notifications. NRRC's will communicate on a government-to-government level by direct satellite links capable of rapid transmission of full texts and graphics. First notifications will occur within one day of entry into force. OSIA will receive notifications from the NRRC's and will distribute them to the inspection teams, escorts, and sites as appropriate.

The following cost estimates were provided by the Department of Defense:

[In thousands of dollars]

Inspection tasks *	FY 1988	FY 1989
Implementing On-Site Inspections	120,300	73,000
Elimination of U.S. Missiles and Associated Equipment	13,950	21,100
Monitoring Soviet Inspectors in the United States	64,100	54,100
Total	198,350	148,200

A classified breakdown of costs is stored in the Committee's files.

F. SPECIAL VERIFICATION COMMISSION

The Treaty establishes a new entity, the Special Verification Commission (SVC), which, if either Party so requests, is to meet to resolve compliance questions and to agree upon measures to improve the "effectiveness and viability of the Treaty." In its basic purposes, the SVC is similar to the Standing Consultative Commission (SCC) established under SALT I and reaffirmed in SALT II.

The Committee questioned why it was thought necessary to have two organizations to serve essentially the same purpose. The establishment of the SVC as a separate entity also seemed to make little sense to a former SCC Commissioner, Ambassador Sidney Graybeal, who told the Committee, "We should benefit from the experience and background of that group (the SCC), and I do not see any reason or justification for two separate bodies."

There appear to be two arguments for the creation of a new body. The first is that the SCC deliberations are private, whereas the workings of such a group should be both public and private to help demonstrate the effectiveness of verification. As Ambassador Graybeal pointed out, it has been possible for Presidents to make public items discussed in the SCC. Moreover, he noted, an amendment to the SCC rules or a clarification could resolve the matter. The other argument is that the SCC meets twice a year, whereas the SVC will meet at the call of either Party. Unfortunately, the obverse is also true in the case of the SVC, in that, without a set schedule, it may never meet. Moreover, critics have ignored the fact that both Parties have agreed that the SCC will meet at the call of either Party.

The Committee notes that the SCC charter is somewhat broader than the SVC charter—and to good purpose. In addition to the responsibilities both Parties have undertaken with regard to both the SVC and the SCC, the Parties have obligated themselves to use the SCC to provide information on a voluntary basis to assure confidence in compliance, to consider questions involving unintended interference with NTM, to consider possible changes in the strategic situation bearing on the provisions of the ABM Treaty, and to consider, as appropriate, proposals for further measures to limit strategic arms, as well as to deal with ABM destruction and dismantling procedures and dates. With the exception of the ABM-specific issues, all of the elements of the SCC mandate would appear relevant to the INF Treaty and other bilateral nuclear agreements which might follow. It makes little sense to overlook such laudable objectives, all of which are significant from the standpoint of our true national security interests.

Some Members conclude that there appear to be numerous advantages, and no noteworthy disadvantages, to a consolidation of the functioning, leadership, and staffing of the SCC and the SVC. Such a consolidation will be particularly important if current negotiations to achieve significant reductions in strategic nuclear weapons reach fruition. An effort should be made to build upon the SCC experience, if we are to be truly careful and serious in our nation's dealings with arms control compliance issues.

The INF Treaty will place new and heavy demands upon those segments of the Executive Branch involved in compliance and verification issues. In addition to the SVC, the Nuclear Risk Reduction Centers will be used to exchange data and notifications and to "provide and receive requests for cooperative measures," and the On-Site Inspection Agency will carry out the inspection specified by the Treaty. Moreover, the intelligence community is charged with monitoring compliance through National Technical Means.

The Committee hopes that care will be taken to ensure that the activities of these new mechanisms are coordinated effectively. Unfortunately, the prime mechanism for dealing with the Soviets on compliance issues in the past, the SCC has been underutilized and has, accordingly, not realized its full potential. To illustrate the problem, the SCC has been forced, on occasion, to deal with the Soviets at regular, scheduled meetings without the benefit of instructions. Asked whether he believed that the lack of a defined role for the new SVC is a problem, former Secretary of Defense Brown said:

> It is undefined, and in my more cynical moments, I sometimes think that its existence as a separate entity is largely so as to avoid using the SCC or any other artifact of previous arms negotiations as part of the mechanism for this one.
>
> But, whatever the reasons, I think the SVC does have to be more carefully defined.

It is clear that, unless proper attention is paid by both the Executive Branch and the Congress, verification could become a bureaucratic morass. It is critically important that clear lines of responsibility and authority be established to ensure the smooth and effective implementation of this Treaty. If the Executive Branch is organized well at this juncture to deal with the demands placed by the INF Treaty, the assumption of additional burdens placed by further arms control agreements should be possible with the necessary confidence. The Committee intends to be fully involved in oversight as the new tasks are addressed to ensure that the resulting structure is completely consistent with our national security requirements with regard to both the INF Treaty and other arms control agreements now in prospect.

F. COMPLIANCE AND ENFORCEMENT

During the course of the Committee's consideration of the INF Treaty, a number of Senators expressed two related concerns about the issue of Treaty compliance. First, some questioned the Administration about its willingness to sign an agreement with the Soviet Union after repeated accusations of Soviet cheating on other arms control treaties. And second, some argued that the Committee should consider adopting a formal condition prescribing U.S. responses to potential Soviet violations of the INF Treaty.

Compliance With Existing Agreements.—The Committee notes that President Reagan, in his March 1987 report to Congress on Soviet compliance stated as policy that "Compliance with past arms control commitments is an essential prerequisite for future arms control agreements." When asked whether this policy has been changed, the Administration insisted that "There has been no change in our policy or our findings with respect to Soviet noncompliance." On the contrary, the Committee believes that a significant policy shift has occurred, because the radar installation near Krasnoyarsk is a violation of the 1972 Anti-Ballistic Missile Treaty. Yet, the Administration is not demanding that the radar be dismantled as a "prerequisite" to the INF Treaty.

Indeed, when Chairman Pell asked the Administration whether ratification of the INF Treaty should be made contingent upon a resolution of the Krasnoyarsk problem, the Administration demurred. As Secretary Shultz put it:

> We believe that the INF Treaty stands on its own merits and should not be linked to other arms control agreements or issues. We have made known to the Soviets our concerns over the Krasnoyarsk radar in many fora and will continue to press for resolution of this problem.

The Committee welcomes the Secretary's view and agrees that such linkage is undesirable, and that insistence upon such linkage could hinder the achievement of arms control agreements which would serve our national security interest. At the same time, the Committee remains deeply concerned about the illegal Soviet radar at Krasnoyarsk and urges the Administration to seek resolution of the problem.

Enforcement.—During the course of the Committee's hearings, Chairman Pell repeatedly questioned the Administration regarding the proper U.S. approach to potential Soviet violations of the INF Treaty. The Administration was categorical in its opposition to predetermined responses to potential Soviet violations. Admiral Crowe summarized the position of the Joint Chiefs of Staff as follows:

> We would wish to determine our response on a case-by-case basis as "real world" problems are unlikely to fit hypothetical scenarios. Consequently, we require the flexibility to deal with compliance issues as they might arise.
>
> Should a Soviet violation be detected, the appropriate response would depend on a timely assessment of the effect the specific violation would have on the military balance. Predetermined response criteria would narrow the assessment and limit both its value and impact. An appropriate response to Treaty violations should be determined on a case-by-case basis and predicated on a comprehensive assessment of a host of complex security considerations.

When asked about the wisdom of a Senate condition prescribing U.S. responses to potential Soviet violations, Secretary of Defense Carlucci told the Committee "We do not believe that such a condition is necessary or useful." Ambassador Nitze went further, telling the Committee "We believe that it would be unwise to attempt to specify in advance U.S. responses to possible Soviet violations." And General Welch, Air Force Chief of Staff, told the Committee, "We do not need to tell the Soviets how we would respond * * * I do not think it is useful for us to try to describe how we would respond. In fact, it is better for them simply to be convinced that we will respond."

The Committee believes the United States must be prepared to respond to Soviet violations as appropriate. However, in the Committee's view, the Senate should not seek to prescribe what response should be taken by the United States to potential Soviet violations.

U.S. Compliance Policy.—Although the Committee concurs that a Senate condition regarding Treaty compliance is neither useful nor necessary, certain recommendations seem appropriate.

In the event Soviet actions appear to contradict their obligations under the INF Treaty, Congress should be kept fully informed. Any questionable activity should be fully discussed in the Special Verification Commission. If the Soviet Union has not, after a sufficient period of time, satisfied United States concerns or ceased the activity in question, and if the Soviet activity is deemed to be militarily significant, the President should propose implementation of an appropriate and proportionate response.

This approach was advocated by Secretary Shultz, who told the Committee, "We believe that proportionate responses should be determined on a case-by-case basis. Once the Administration reaches the decision determining that a violation has occurred we would work with the Congress in implementing an appropriate response." Secretary Carlucci advocated a similar course while emphasizing the criterion of "military significance":

> If there is cheating on a treaty we need to go immediately to the Special Verification Commission to try to correct the infraction. If we are over a period of time unsuccessful *and assuming the infraction is militarily significant,* then we and the Congress need to take appropriate action to maintain our deterrent.

Secretary Carlucci's emphasis on "militarily significant" violations was echoed by Secretary Shultz, who told the Committee "if there is some major violation that is militarily significant, then there has to be a presumption that the Congress as well as the Administration is ready to do something about it." Determining in advance what kind of Soviet violations would be "militarily significant" is extremely difficult. Moreover, by saying which responses would be "militarily significant" the United States could send an unfortunate message to the Soviet Union—that the United States will not object to lesser violations.

Secretary Shultz provided the Committee with the following explanation of how the Administration would determine whether a violation was "militarily significant":

> In determining the military significance of any given case of cheating, we would take into account the following kinds of factors:
>
> —The quantitative level of cheating and the overall threat it posed to U.S. and NATO defenses.
>
> —Qualitative factors, including the kinds of weapons involved in any cheating and their specific capabilities for target coverage, survivability, etc.
>
> —Our assessment of the state of readiness and training or a cheating force.
>
> —The extent to which other forces available to the Soviets render a cheating force largely redundant or conversely comprised a significant additional military capability.
>
> —The extent to which the U.S. and its Allies possessed existing military forces or surge capabilities which could permit an effective counter to a Soviet cheating force.
>
> —The overall political and military situation surrounding the discovery of Soviet cheating, e.g., whether that situation was one of relative stability, one of tension etc.

In the Committee's view, all of these factors should go into any calculation by the Administration as to the military significance or potential Soviet violations.

VI. OTHER ISSUES

A. NUMBERS OF SOVIET MISSILES

Prior to the signing of the INF Treaty in December, the Parties exchanged information on their missile systems as of November 1, 1987. That information was incorporated into the MOU transmitted to the Senate. The chart below was assembled drawing upon the information in the MOU:

SYSTEMS TO BE ELIMINATED BY THE INF TREATY

	Missiles			Launchers		
	Deployed	Non-deployed	Total	Deployed	Non-deployed	Total
Soviet systems:						
SS–20	405	245	650	405	118	523
SS–4	65	105	170	79	6	85
SS–5	0	6	6	0	0	0
SS–12/22	220	506	726	115	20	135
SS–23	167	33	200	82	20	102
Total	857	895	1,752	681	164	845
U.S. systems:						
Pershing IA	0	170	170	0	0	0
Pershing II	120	127	247	115	52	167
GLCM	309	133	442	109	17	126
Total	429	430	859	224	69	293

In the course of the Committee hearings, questions were raised as to the validity of the data provided in the MOU by the Soviets. At particular issue was the Soviet supplied figure for 245 non-deployed SS–20 missiles. Concern was expressed that this figure did not comport with estimates made by the U.S. intelligence community prior to the conclusion of the INF Treaty. The Committee explored these points with senior officials of the intelligence community in closed session.

In the course of hearings, the Administration provided this unclassified response to the allegation that the majority of intelligence agencies believe that more SS–20 missiles have been produced than were declared by the Soviets:

> The statement is incorrect. The majority of the national intelligence community does not support the view that the Soviets withheld a number of SS–20's. All data will be reviewed in the updated MOU and verified through on-site inspection. The Director of Central Intelligence, speaking for the entire intelligence community, has said that the Soviet data in the MOU fall within intelligence community estimates.

Intelligence agency estimates on the number of non-deployed SS–20's have varied. However, these differences are inherent in the inter-agency intelligence process, where estimates are of necessity based on incomplete information and where assumptions between agencies differ. Secretary Shultz testified to this fact before the Committee, stating: "I would be surprised if there were not differences of opinion. They reflect independent analysis which helps keep us all alert."

Secretary Carlucci also addressed this issue in a written answer for the record:

> We have made it clear that there are some differences within the U.S. Intelligence Community over estimated numbers of Soviet systems. It is not surprising that there are differences of opinion; they reflect independent analyses which add to the strength of our monitoring process. The Soviet numbers for deployed and non-deployed forces are, for the most part, near the estimates of our Intelligence Community, allowing for the range of our uncertainties. However, there are some differences in agency views of the number of non-deployed SS–20's. Estimates for non-deployed systems are, of course, inherently less certain. They vary by agency, reflecting the independent analyses noted above. There are 3 agency views. Two are close to the Soviet declared number. One is not.

Accordingly, most Members concluded that while the Soviet figures could well be accurate, it is also possible that there are additional missiles in storage. However, the Committee knows of no responsible official who believes that such missiles in covert storage could possibly constitute a usable force.

It is important to understand that the United States will be able to verify the numbers and locations of declared missiles and launchers following entry into force, through a combination of on-site inspection and National Technical Means. Moreover, the actual elimination of the systems will be effectively verified through on-site inspections at the elimination facilities. Within 18 months, the Soviet shorter-range forces will be eliminated. The same will be true within three years for the intermediate-range forces.

Concern has been expressed that the Soviets could maintain a covert force of non-deployed SS–20's through a variety of cheating measures. While it may be possible to evade one of the verification measures in the treaty, the combination of all measures, including particularly the ban of flight training and flight testing, will ensure that any covert force would rapidly lose its military utility.

In a written answer for the record, Secretary Carlucci stated:

> The capability of detecting covertly stored Treaty-limited weapon systems will depend on the scenario, including size of force, state of readiness, mode of operations, training requirements, and a number of other factors. But the Treaty is designed to deal with possibilities such as the Soviets having more non-deployed SS–20's than we assess. Our National Technical Means can verify Soviet compliance with the Treaty's ban on INF flight testing, as well as with the Treaty's ban on INF infrastructure and activity. Testing, training, and infrastructure are essential to a militarily effective force. Thus,

unless the Soviets were willing to risk detection, the military effectiveness of concealed SS-20's would degrade over time.

The Arms Control and Disarmament Agency reached this judgment with regard to covert forces in a March 8, 1988, report to the Congress, "INF Treaty Verification: Our ability to Assess Compliance under a Double Global Zero":

> First, after the elimination period, all launch-critical INF equipment will be destroyed and no INF infrastructure (e.g., bases, manufacturing, storage facilities, etc.) may be used to conceal or support INF systems.
>
> Second, the ban on flight testing of INF systems will make it difficult over time to retain a covert force that can be made operationally useful.
>
> Third, after the reduction phase is complete, the verification task will be solely to detect (not count) mobile INF systems—a still demanding but much less complicated task than verifying compliance with numerical limits.
>
> Thus, over time, and without any flight testing, we judge it will be increasingly difficult for the Soviets to hide a covert force that can be made operationally useful.

Given these judgments, it is clear that the Soviets have little incentive to deceive with regard to SS-20's. If they value this Treaty and the prospect of further arms control agreements, they understand that any cheating is a high-risk activity. Moreover, since a covert, untested, and unexcercised force could have no deterrent or political intimidation value and, given other forces still available, quite limited military value, the obvious and wise choice would be compliance with the requirement of the Treaty for complete elimination of INF systems.

During the Committee markup, Senator Helms offered a condition on the question of the validity of the number of SS-20's the Soviet Union declared. Senator Helms' proposal would have mandated a Presidential certification that the number of SS-20 missiles declared by the Soviet Union was the correct number. For the reasons explained above, the Committee rejected this condition by a vote of 15-2.

B. WARHEADS VS. MISSILES

During the Committee's initial hearings, much media attention focused on several Senators' expressed concerns that, while the Treaty provides for the dismantlement of missiles, it does not require destruction of the associated nuclear warheads. The failure of Administration witnesses to provide a prompt and effective explanation allowed this issue to gain notoriety.

Having assessed the matter, most Members concluded that eliminating a particular delivery system is sufficient to eliminate the threat posed by weapons delivered by that system. But there are, in addition, three reasons why the Treaty, in eliminating certain delivery systems, does not stipulate destruction of the associated warheads:

> First, the United States did not wish the Treaty to provide for warhead elimination since any arrangements necessary for verification of warhead destruction would have allowed Soviet

inspectors to learn details of advanced American technology which the Administration quite rightly did not want conveyed to the Soviets.

Second, even if warhead destruction arrangements could be agreed upon, the elimination of specified numbers of warheads would prove nothing with regard to the warhead stockpile of a party, even of the types theoretically being eliminated, since warhead inventories are simply not verifiable in any event. It is this fact which has led to the arms control efforts to eliminate launchers and missiles rather than warheads.

Third, any agreement involving the disposal of fissionable material while both sides are manufacturing these materials and intend to continue to do so would have been particularly counterproductive for the United States, which is in shorter supply of such material than the Soviet Union. Furthermore, this would exacerbate environmental problems surrounding the disposal of nuclear materials.

Thus while it is true that the warheads will not be eliminated under the terms of the INF Treaty, it bears emphasis that the guiding purpose of the treaty was not to eliminate nuclear weapons per se—that is a much longer term goal—but to eliminate certain kinds of politically significant nuclear missiles, i.e., accurate land-based missiles with ranges between 500 and 5,500 kilometers.

All told, allegations that there was a problem because no warheads would be eliminated proved to be thoroughly unpersuasive, and most Committee Members were undecided only as to whether it constituted a "red herring" or a "crimson whale."

C. CRUISE MISSILES

The Treaty's treatment of ground-launched cruise missiles (GLCM's) was a matter of some interest during the course of the Committee's hearings. Concerns were expressed regarding three issues:

—Whether the Treaty's prohibition on GLCM's could be circumvented through deployment of sea-launched cruise missiles (SLCM's);

—Whether the exception for GLCM's which are not weapon delivery systems could be verified; and

—Whether the Treaty's prohibition on conventional GLCM's was desirable.

The Treaty defines a cruise missile as an "unmanned, self-propelled vehicle that sustains flight through the use of dynamic lift over most of its flight path." The Treaty covers only cruise missiles that are ground-launched and only those that are "weapon-delivery vehicles." (See next section for a discussion of the term "weapon-delivery".) Further, the treaty covers only those GLCM's having a range capability between 500 and 5,500 kilometers, with that capability being defined in terms of an engineering judgment regarding the missile's fuel capacity and flight path.

Both the United States and the Soviet Union are obligated under the Treaty to eliminate all such existing GLCM's and not to produce, test, or deploy any such GLCM's in the future. The U.S. declared that it possessed 442 BGM-109G missiles which are

Treaty-limited GLCM's, and the Soviet Union declared that it possessed 84 SSC-X-4 Treaty-limited GLCM's. The Soviet GLCM's were defined as weapon systems which were tested but not deployed. All these GLCM's must be eliminated.

SLCM's Versus GLCM's.—The possibility of circumvention through SLCM's arises because SLCM's are virtually identical to GLCM's. The Treaty will not limit U.S. or Soviet SLCM's, which allows either side to produce and deploy as many of these weapons as it chooses. Moreover, Article VII (paragraph 11) allows an exception for testing SLCM's from fixed land-based launchers. Consequently, the possibility exists for the Soviet Union to produce a large number of SLCM's and test them in a ground-based mode—rendering them very similar to GLCM's.

In response to questions from Senator Kerry, Ambassador Glitman acknowledged the problem, but stated that Soviet deployment of a large covert force would be unlikely because the exception is designed for testing purposes and the difference between preparing a large force of fixed land-based SLCM's and merely testing SLCM's in a land-based mode would be "readily understandable." Ambassador Glitman pointed out that, unlike current GLCM's which are mobile, such a force would have to be a fixed system. Moreover, Ambassador Glitman emphasized that this exception was a result of a U.S. requirement to test SLCM's in a ground-based mode.

While concerned about the technical possibility that the Soviet Union could exploit this provision to develop a covert force of ground-based cruise missiles, the Committee is satisfied that the Administration is aware of the problem and will be monitoring it closely.

Weapon Delivery GLCM's vs. Drones.—The Treaty's definition of covered GLCM's (Article II, paragraph 2) clearly excludes GLCM's that are not "weapon-delivery vehicles," such as reconnaissance drones. Concerns were raised that the Soviet Union could exploit this exception by producing, testing, and deploying GLCM's designed as drones and then quickly convert that force to carry nuclear warheads.

Ambassador Glitman explained to the Committee that "there is a different type of infrastructure that would go with a reconnaissance drone than would go with a cruise missile that would be used for a nuclear, or for that matter, a conventional delivery basis." Ambassador Glitman asserted that the United States can distinguish between GLCM's that are drones and those designed to carry nuclear or conventional weapons. Senator Cranston added that he had been assured during Intelligence Committee briefings that the U.S. can verify testing of a GLCM drone in a nuclear bombing mode."

Again, Ambassador Glitman emphasized that the provision was designed to protect U.S. interests; it allows reconnaissance drones because "we have an interest, or course, in maintaining an ability to have drones."

The Committee recognizes that the exception for drones poses a minor problem. However, a Soviet attempt to conceal an INF missile force through reconnaissance drones would be highly problematic because the Soviet Union would have very low confidence in a nuclear GLCM only tested as a drone. Moreover, the operational patterns of drone units as opposed to weapon units is sufficiently different that a weapon unit would likely be detectable. Given these factors, which would greatly inhibit any Soviet incentive to cheat, and considering the U.S. interest in continuing to test GLCM drones, the Committee finds that on balance this exception serves the U.S. interest.

Conventional GLCM.—As intended, the Treaty prohibits both nuclear and conventional GLCM's. In testimony to the Committee, however, former Assistant Secretary of Defense Richard Perle advocated amending the Treaty to permit conventionally-armed GLCM's. Mr. Perle argued that the United States should not forgo the right to deploy conventional GLCM's, which he thought could be useful in the future. He acknowledged that distinguishing between conventional and nuclear GLCM's is not verifiable but claimed that the ban on GLCM's was not verifiable in any case, because of the exception for drones and because GLCM's tested to a range below 500 kilometers can easily be extended beyond 500 kilometers. During the Committee's mark-up, Senator Helms proposed an amendment along these lines. The amendment was rejected by a vote of 15-3.

As noted above, the Committee views the prospect of Soviet efforts to develop a covert GLCM force from drones as highly unlikely and impractical. Developing a covert GLCM force from systems tested below 500 kilometers would be complex and unreliable. For example, the Soviets could hardly be confident that even if a cruise missile were accurate at a range of 490 km, it would also be accurate at 980 km. This "loophole" is thus more theoretical than real.

In contrast, during the debate Senators pointed out that permitting conventional GLCM's would create a very real verification problem. The Soviets could develop or deploy a "conventional" GLCM force that could be tested and trained for all distances between 500-5,500 km. It could become a nuclear force within minutes simply by replacing the warhead.

Indeed, Secretary of Defense Carlucci warned the Committee that if conventional GLCM's were permitted, "the Soviet ability to maintain an operational nuclear GLCM capability under the guise of a permitted conventionally-armed GLCM program would be high and *would provide the Soviets a ready means of breaking out from the Treaty.*" (Emphasis added.)

The Administration has stated clearly that the Joint Chiefs of Staff have determined that the United States has no military requirement for conventional GLCM's with a range between 500 and 5,500 kilometers. Given the lack of military need and the danger of opening up a genuine loophole to the Soviets, the Committe judges that such an amendment would be extremely unwise and directly contrary to U.S. security intersts. The Administration apparently reached the same rather obvious conclusion. Accordingly, the Committee believes that claims about a GLCM drone "loophole" are pure sophistry and that any amendment purporting to allow conventional GLCM's could undermine U.S. national security.

D. MISSILES WITH FUTURISTIC WEAPONS

During the course of the Committee's hearings, the question arose as to the definition of a missile covered by the INF Treaty. The INF Treaty sets out four criteria for determining whether a missile is covered. These four criteria, contained in Article II of the Treaty are: (1) Whether the missile is a ballistic or cruise missile; (2) whether the missile is ground-launched; (3) whether the missile's maximum tested range is between 500 and 5,500 kilometers; and (4) whether the missile is a "weapon-delivery" vehicle.

An issue of considerable concern to the Committee was how the term "weapon-delivery" should be defined. The Administration's Article-By-Article Analysis defines a weapon-delivery vehicle as a missile "flight-tested or deployed with any type of warhead device or simulation thereof." Some construed this language as exempting missiles using weapons other than conventional or nuclear warheads because the term "warhead device" was used in the Administration's definition.

The Committee sought further clarification from the Administration as to the applicability of the term "weapon-delivery" to missiles using weapons other than conventional or nuclear warheads, such as high-energy lasers. Ambassador Glitman provided the Committee with the following U.S. definition of "weapon-delivery":

> The United States believes that the common sense meaning of the term "weapon-delivery vehicle" in the context of this treaty is any INF missile which carries a weapon, that is, any mechanism or device which, when directed against a target, is designed to damage or destroy it.

Ambassador Glitman also testified that he believed the Soviet negotiators clearly understood this meaning of the term "weapon-delivery." However, according to Ambassador Glitman:

> [D]uring the negotiations, the United States and the Soviet Union did not specifically discuss INF missile systems using techniques, such as lasers, to destroy targets, nor did the parties specifically address the meaning of the term "weapon-delivery."

Ambassador Glitman was unconcerned that this issue was not directly discussed in the negotiations. As he told the Committee:

> The parties recognized that it would be unnecessary to define in the treaty terms which had commonly understood meanings or where the common sense meaning of the term was intended by the treaty. The term "weapon-delivery" was one of those terms. There was a common sense meaning to the word "weapon," and it was apparent to both sides that we would not have to define every word that was in the treaty. There was no argument about what a "weapon" was.

Ambassador Glitman explained that it was the clear intent of the parties to cover missiles with future weapons because the Treaty was designed to last in perpetuity. As he put it:

> This is a treaty in perpetuity. It has to be thinking about the future. If you write a treaty forever, you have to take into account what is going to happen in the future. What this clearly shows is that we intended to capture any future weapon deliv-

> ery system that is ground-launched, ballistic or cruise, and falls within the range bands covered by the Treaty.

Based upon an examination of the negotiating materials provided to the Senate, the Committee concurs with Ambassador Glitman's account of the issue. U.S. and Soviet negotiators did not directly address the issue of whether missiles using lasers or other futuristic devices would be covered under the term "weapon-delivery." At the same time, the Soviet side clearly did seek to ensure that the Treaty covered all missiles in the INF range-band. Indeed, given the fact that this type of advanced technology is an area of relative U.S. advantage, it would be surprising if the Soviet Union would not seek to capture such weapons if at all possible.

In the Committee's view, the fact that the negotiators did not explicitly discuss the meaning of "weapon-delivery" should not change the meaning of the term. Based on the ordinary meaning of the term "weapon," missiles using weapons other than conventional or nuclear warheads would be covered under the INF Treaty. The INF Treaty does not provide for any exceptions to the term weapon-delivery vehicle. It is therefore hard to imagine how an exception for missiles using lasers to damage or destroy targets can be justified by the Treaty text.

Moreover, an examination of the negotiating materials provided to the Senate by the Administration reveals that neither party sought to exclude particular "weapons" from the term "weapon-delivery" vehicle. The fact that neither party sought exceptions provides strong evidence that the intent of both parties was indeed to cover all intermediate-range and shorter-range missiles—those using conventional and nuclear warheads to damage or destroy targets and those using futuristic weapons to damage or destroy targets.

In a letter to Chairman Pell, Ambassador Kampelman summed up the Administration's position as follows:

> In the context of the INF Treaty, it is our considered judgment that the Parties understand the term "weapon-delivery vehicle" to mean any INF ballistic or cruise missile system that is tested or deployed to carry a weapon—that is, any mechanism or device which when directed against a target is designed to damage or destroy it. Accordingly, it is not necessary to confirm this understanding with the Soviet Union as a condition to the Senate's giving its advice and consent to ratification of the INF Treaty.

In the Committee's judgment, there is no firm basis to dispute the Administration's testimony that futuristic weapons would be banned by the Treaty. At the same time, given the long-standing Soviet attempt to capture advanced technologies—an area of relative U.S. advantage—in arms control agreements, the Committee urges the Administration to consider seeking, through diplomatic channel, explicit clarification from the Soviet Union that future weapons are covered by the INF Treaty.

E. THE SOVIET UNION AND HUMAN RIGHTS

During the Committee mark-up, Senator Pressler offered a condition that would have delayed ratification of the INF treaty until the President certifies to the Senate that the Soviet Union is faithfully meeting its obligations under and is in full compliance with the provisions of the Helsinki Final Act. Had this condition been adopted, it could have delayed ratification indefinitely. The Committee rejected the condition by a 16–2 vote.

The Committee recognizes that arms control is not the be all and end all of the Soviet-American relationship. The Committee takes very seriously the need to promote improvements in the Soviet human rights situation and fully shares the spirit underlying the Pressler condition. Nevertheless, formally linking the INF Treaty to improvements in the human rights situation in the Soviet Union will not result in such improvements. Such linkage will only sabotage the INF Treaty.

This view was shared by most of the witnesses who testified before the Committee on this subject. As Rabbi David Saperstein, who testified on behalf of the National Jewish Community Relations Advisory Council, told the Committee, "the Jewish community wholeheartedly supports the INF Treaty in its current form." He went on to say that "in our view, indeed, the two issues—nuclear arms control and human rights—are each of such towering importance that to link them formally would be to commit a grave error * * *. When one addresses such crucial concerns of basic moral principle and fundamental interests, improvement in one area should not be made contingent on the other."

Human rights practices in the Soviet Union, particularly in the area of emigration, have tended to improve when there is an easing of tensions between East and West. As Rabbi Saberstein told the Committee, "there is a positive relationship between improvement in arms control and in human rights * * *. As a number of experts on the Soviet Union have noted, the plight of dissidents in general, and of Soviet Jewry in particular, tends to improve during periods of détente and cooperation." By formally linking the INF Treaty to a presidentially certified improvement in Soviet human rights practices, Senator Pressler's amendment would have effectively undermined the INF Treaty. That, in turn, would have led to a deterioration in U.S.-Soviet relations, which would likely result in more restrictive Soviet emigration policies. Therefore, the Committee believes that attaching conditions to the INF Treaty is not an effective way of addressing the human rights problem.

At the same time, the Committee believes that human rights remains a central element in U.S.-Soviet relations, and it will continue to press for effective measures to improve Soviet human rights practices. The Committee also urges the Administration to continue to emphasize the central role of human rights in the U.S.-Soviet relationship.

F. FUTURE ARMS CONTROL

1. Verification Precedents Set By The INF Treaty

An issue that concerned many Senators during the course of the hearings was the degree to which the verification regime for INF should be considered a precedent for verification of a START Treaty. The Administration indicated that a number of the INF

Treaty's verification provisions would provide important precedents.

The Committee notes the agreement reached between the United States and the Soviet Union on key elements of the START verification regime at the Washington Summit meeting between President Reagan and General Secretary Gorbachev. In this regard, the Committee believes that the verification principles outlined in the Joint Statement, issued at the conclusion of the summit, provide important guidelines for the START verification regime. These guidelines are based largely on precedents established by the INF Treaty, as the following excerpt from the Washington Summit statement indicates:

> (e) Building upon the provisions of the Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, the measures by which the provisions of the Treaty on the Reduction and Limitation of Strategic Offensive Arms can be verified will, at a minimum, include:
>
> 1. Data exchanges, to include declarations by each side of the number and location of weapon systems limited by the Treaty and of facilities at which such systems are located and appropriate notifications. These facilities will include locations and facilities for production and final assembly, storage, testing, and deployment of systems covered by this Treaty. Such declarations will be exchanged between the sides before the Treaty is signed and updated periodically after entry into force.
> 2. Baseline inspection to verify the accuracy of these declarations promptly after entry into force of the Treaty.
> 3. On-site observation of the elimination of strategic systems necessary to achieve the agreed limits.
> 4. Continuous on-site monitoring of the perimeter and portals of critical production and support facilities to confirm the output of these facilities.
> 5. Short-notice on-site inspection of:
>   (i) declared locations during the process of reducing to agreed limits;
>   (ii) locations where systems covered by this Treaty remain after achieving the agreed limits; and
>   (iii) locations where such systems have been located (formerly declared facilities).
> 6. The right to implement, in accordance with agreed-upon procedures, short-notice inspections at locations where either side considers covert deployment, production, storage, or repair of strategic offensive arms could be occurring.
> 7. Provisions prohibiting the use of concealment or other activities which impede verification by National Technical Means. Such provisions would include a ban on telemetry encryption and would allow for full access to all telemetric information broadcast during missile flight.
> 8. Measures designed to enhance observation of activities related to reduction and limitation of strategic-offensive arms by National Technical Means. These would include open displays of Treaty-limited items at missile bases,

bomber bases, and submarine ports at locations and times chosen by the inspecting Party.

2. Selected START Verification Issues

The Committee believes that the issue of START verification is extremely important. The INF Treaty ratification hearings were not intended to cover in detail the many issues that must be addressed and resolved before a verifiable START agreement could be completed. However, during the course of the Committee's hearings certain issues pertaining to START verification did arise.

Verification Standard for START.—The most important decision to be made in determining what type of verification regime will be necessary for START relates to the verification standard the regime is designed to achieve. In the case of the INF Treaty, the Committee believes the standard of effective verification—defined as being able to detect militarily significant Soviet violations in time to respond effectively—is the right standard. In response to questions from Chairman Pell, Secretary of State Shultz testified that the same verification standard used in the INF Treaty "will be applied to any START agreement." The Committee endorses this goal. The START verification regime should be designed to detect militarily significant cheating in time for the United States to respond effectively. A regime that meets this standard is fully sufficient to protect U.S. security interests and the Committee expects no less from a START verification regime.

Verification Differences Between INF and START.—While the verification standard for a START agreement should be the same as that applied to the INF Treaty, it will be more difficult to meet that standard under a START agreement. Unlike the INF Treaty, which requires the complete elimination of INF systems, a START agreement will simply place numerical ceilings on various strategic systems. This will make the verification task more difficult under START.

Under the INF Treaty, the U.S. need only verify the complete absence of Treaty-banned systems. The detection of a single prohibited item would indicate a violation. Under a START agreement, however, the U.S. must be able to detect and count all the Treaty-limited items to determine whether the total falls within the ceiling set by the Treaty.

The incentives to cheat could also be greater under a START regime. Because the INF Treaty involves a complete ban on certain weapons systems, it also prohibits both sides from conducting missile flight tests or maintaining an infrastructure for INF systems. The flight-test ban greatly diminishes the Soviets' incentive to illegally hide missiles since, without testing, they could not be confident of the continued reliability of those missiles. As Secretary Shultz told the Committee, "both testing and infrastructure can be detected by National Technical Means. Without them, the systems simply become obsolete." Unlike the INF Treaty, however, a START agreement will not outlaw the testing of Treaty-limited systems. Therefore, the Soviets could, conceivably, be confident about the continued reliability of any illegally hidden weapons systems.

The greater verification burdens of a START agreement have raised a number of important questions. Three issues arose during consideration of the INF Treaty which bear on the emerging START Treaty. First, how extensive should the on-site inspection requirements be? In particular, should the verification regime in START include "anytime, anywhere" inspections? Second, what impact should verification considerations have on the desirability of including non-deployed missiles in a START Treaty? And third, what impact should verification considerations have on the START agreement's treatment of dual-capable weapons systems?

Anytime, Anywhere Inspections.—The INF Treaty does not provide the United States the authority to conduct challenge inspections of any "suspect site" in the Soviet Union. That is, the United States cannot demand the right to inspect a suspicious site "anywhere" in the Soviet Union "anytime" it wants. Instead, U.S. inspection rights are limited to those sites listed in the MOU.

During much of the INF negotiation, the United States had insisted on the right to conduct some form of "anytime, anywhere" inspections. Ambassador Glitman told the Committee that the United States dropped that demand when the Soviets agreed to a total ban on INF systems. As described in the section above, it is easier to verify a total ban on weapons systems than a numerical ceiling on such systems. The Administration's logic on this issue suggests that it would demand "anytime, anywhere" inspections for arms agreements, such as START, which limit but do not eliminate weapons systems. Indeed, the Joint Statement establishing guidelines for the START agreement leaves open the possibility that inspections may occur, according to agreed procedures, "at locations where either side considers covert deployment, production, storage, or repair of strategic offensive arms could be occurring."

An "anytime, anywhere" inspection regime, however, could pose certain risks to U.S. security. Soviet inspectors could obtain sensitive information from inspected U.S. facilities. Indeed, Administration witnesses acknowledged that the United States did not drop its demand for 'anytime, anywhere' inspections simply because the Soviets agreed to a complete ban on INF systems. Another reason for dropping the demand was an uneasiness about granting the Soviets access to sensitive U.S. facilities. As Ambassador Nitze told the Committee, "We did not want the Soviets roaming around some of the very highly classified facilities in the United States." And, Secretary Shultz told the Committee, "There are both political and practical problems associated with 'anytime, anywhere' inspections." These same problems would exist under an "anytime, anywhere" inspection regime for a START agreement. Indeed, since the START agreement would cover a much wider variety of weapon systems, the Soviets could more reasonably demand access to many more sensitive facilities than they could have under the INF Treaty.

Nevertheless, Secretary of Defense Carlucci and Ambassador Nitze told the Committee that some form of "anytime, anywhere" inspections might well be part of a START agreement. Secretary Carlucci testified that "I think we are probably going to have to have some form of challenge inspections, suspect site inspections under START." Former Secretary of Defense James Schlesinger told the Committee that "anyplace, anytime—will probably be the right regime for START."

Ambassador Sidney Graybeal, former U.S. Representative to the Standing Consultative Commission argued strongly against such inspections. He testified that:

> In my view, the disadvantages of such "anywhere, anytime" inspections exceed their advantages, and we may be well advised to rely on our National Technical Means supplemented by cooperative measures and some limited on-site inspections for deterrence purposes. This view also applies to the verification regime for a START agreement.

Ambassador Graybeal maintained that such inspections will provide the Soviet Union with better opportunities to obtain sensitive information about U.S. facilities. He also argued that such inspections have limited utility because the Soviet Union would never allow U.S. inspectors to actually detect a violation at a "suspect site." For these reasons, he said "I do not believe they [anytime, anywhere inspections] are in the net U.S. interest for a START agreement."

Former Secretary of Defense Harold Brown also downplayed the need for such inspections. He argued that the United States had genuine secrets which should not be laid open to Soviet inspectors. Dr. Brown advocated a regime in which challenge inspections would be permitted at "potential deployment areas, rather than production areas."

Ambassador Nitze told the Committee in early February that the Administration had not yet decided whether to incorporate "anytime, anywhere" inspections in the START verification regime. Apparently, if such inspections were to be incorporated, a "right of refusal" would also be employed. The right of refusal would enable either Party to deny an inspection if the Party to be inspected believed that the inspection could compromise specified sensitive facilities. During the INF Treaty negotiations, reportedly such an approach—known as the "Froot Loops/Secret List plan"—was considered. In the view of some Committee members, such a regime could very well become unmanageable and unsatisfactory. It would lay open the high probability of the U.S. government identifying a Soviet site as suspect and then being denied access to the site. Such a scheme could at a minimum generate unnecessary friction between the United States and the Soviet Union and at a maximum be a prescription for treaty breakdown.

Absent a right of refusal, "anytime, anywhere" inspections have the potential for damaging U.S. security. Since it is highly unlikely that the Soviet Union would ever permit U.S. inspectors to discover Soviet violations of a START Treaty, such inspections really have only one benefit: That is, deterring Soviet violations in the first place (although such inspections could also be employed to clarify misunderstandings). Weighed against the prospect of giving Soviet inspectors access to sensitive U.S. facilities, most Committee Members believe that on balance "anytime, anywhere" inspections in START have limited value and pose considerable risks. The Committee intends to explore with the Executive the risks and benefits of such inspections in START.

Limiting Non-Deployed Missiles.—A second issue of concern to the Committee is the impact of verification considerations on the desirability of limiting non-deployed missiles in START. Unlike the

SALT I and SALT II treaties, which limited only deployed weapons systems, the INF Treaty also covers non-deployed weapons systems. A major reason for excluding non-deployed weapons systems in SALT I and SALT II was the difficulty of verifying limits on such systems. While deployed launchers can be monitored by National Technical Means (NTM), it is more difficult to monitor limits on non-deployed systems through NTM.

Despite these monitoring difficulties, the Committee believes the U.S. can effectively verify Soviet compliance with the ban on non-deployed INF missiles. That verification task is made easier by the fact that the INF Treaty imposes a total ban on INF systems. As Secretary Shultz told the Committee, "the zero-option really pays dividends for verification * * * The existence of any intermediate or shorter range missile will be a violation." A START agreement, however, will not benefit from the verification "dividends" of a "zero-option." It will be significantly more difficult to verify compliance with numerical ceilings on non-deployed missiles than the complete absence of such systems.

A START agreement will also lack another important element of the INF Treaty—the ban on flight testing. As Secretary Shultz told the Committee, "the Treaty is designed to deal with possibilities such as the Soviets' having more non-deployed SS–20's than we think they do. Our National Technical Means can verify Soviet compliance with the treaty's ban on flight testing." And, without testing, Secretary Shultz said, hidden missiles will "lose their reliability over time, and become obsolete." The importance of the flight-test ban to the overall verifiability of the INF Treaty was also emphasized by the Joint Chiefs of Staff. In the case of a START agreement, hidden Soviet missiles would presumably assume greater military significance than non-deployed INF missiles given that flight-testing of missiles will be permitted, but the Committee is currently not in a position to assess how militarily significant hidden missiles would be in a START environment.

Because limits on non-deployed missiles will be more difficult to monitor, and because it is the Administration's view that hidden missiles will assume greater military significance, Secretary Shultz and Secretary of Defense Carlucci both indicated that a START verification regime will have to be far more intrusive than the INF regime. In the absence of an analysis of the military threat posed by hidden missiles, the Committee is unable to make a judgment concerning how an intrusive verification regime would serve U.S. interests in START. However, as discussed in the "anytime, anywhere" section above, the more intrusive the inspection regime, the greater the risks that sensitive U.S. information will be revealed to Soviet inspectors.

Dual-capable Systems.—A third issue which arose during the course of the hearings is the ability of the United States to verify the armament of cruise missiles. The Administration explained that the primary reason the INF Treaty prohibits both conventional and nuclear ground-launched cruise missiles is because of the extreme difficulty of determining a cruise missile's armament.

According to the Joint Statement issued at the Washington Summit meeting, the emerging START Treaty will include limitations on sea-launched and air-launched cruise missiles. The Joint

Statement specifically refers to limits only on "nuclear" versions of these two types of cruise missiles. Accordingly, Committee members expressed some concern regarding the U.S. ability to verify whether cruise missiles limited in START are armed with nuclear or conventional warheads. Given the Administration's assertion that conventional ground-launched cruise missiles were prohibited by the INF Treaty because of verification difficulties, some members wondered how the START agreement would resolve this question.

In a lengthy colloquy with Senator Biden, Secretary of Defense Carlucci explained that the Administration has sought to exclude limits on conventional SLCM's from START and that the rationale for excluding these missiles is to protect a conventional weapon of significant military capability. Secretary Carlucci agreed with Senator Biden that the argument for including conventional GLCM's applies just as well to conventional SLCM's, but urged that the Committee not consider the INF agreement as a precedent in the case of conventional SLCM's. In his final plea, Secretary Carlucci urged Senator Biden "to resist the demands of logic, at least at this stage of the negotiations."

The Administration has not yet explained how it would address verifying limits on nuclear armed cruise missiles in START if conventional versions are permitted. Ambassador Nitze told the Committee that the Administration has not "worked out" a means of verifying the armament of SLCM's. Ambassador Nitze left some room for resolution when he testified that the issue has not been "firmly decided."

In the Committee's view, a START agreement must be effectively verifiable. Effective verification of a provision which limits only nuclear SLCM's has not yet been identified. It difficult to understand why protecting U.S. conventional cruise missile capabilities and options is more important than ensuring the overall verifiability of the emerging START Treaty. If the Administration cannot provide a means of effectively verifying the armament of SLCM's, it has only two choices: Either START should exclude limitations on SLCM's altogether; or the limits on SLCM's must apply to all missiles regardless of their armament.

3. Another Precedent From the INF Treaty: Asymmetrical Reductions

Under the INF Treaty, U.S. and Soviet forces are not reduced by equal amounts, they are reduced to equal levels. Thus, to achieve the global elimination of INF systems, the Treaty requires the destruction of 857 deployed Soviet missiles, compared with 429 deployed U.S. missiles. These deployed Soviet missiles are capable of delivering four times as many warheads as the U.S. systems. In addition, the Treaty requires the destruction of a total of 1,752 Soviet missiles (i.e. deployed and non-deployed), compared with a total of 859 U.S. missiles. As the Chairman of the Joint Chiefs of Staff, Admiral Crowe, told the Committee: "This asymmetrical reduction is politically significant—a very valuable precedent for future arms control negotiations."

This precedent will be particularly valuable in the context of future conventional arms negotiations. Because of the significant

Soviet advantages in many categories of conventional weaponry, Secretary Carlucci told the Congress that "to be acceptable, reductions must be highly asymmetrical and large on the Warsaw Pact side." General Secretary Gorbachev has already expressed a willingness to make asymmetrical cuts in those areas where the Warsaw Pact has an advantage. These words must be translated into action.

The precedent of taking asymmetrical steps to achieve equal levels of security can be creatively applied to other areas as well. Given the probable difficulty of reaching early agreement on conventional arms reductions, it would be useful for both alliances to seek interim restrictions on military activities in Europe. A number of options have been proposed. An example was advanced in a Committee hearing by Ambassador Jonathan Dean, a former U.S. Representative to the MBFR negotiations, who suggested these constraints might include a mutual pullback of major ammunition, fuel storage depots, heavy weapon systems, and bridging equipment to a specified distance from the intra-German border. To avoid large scale disruptions, the zone should be no more than 50 kilometers wide on the NATO side. But it should be at least 100 kilometers wide on the Pact side because of the greater depth of Warsaw Pact territory and because the Soviet Union is so much closer to the German border than the United States. Ambassador Dean suggested that such an asymmetrical arrangement would create a buffer zone and decrease the chances of an unintentional conflict erupting along the world's most fortified border. It would also increase crisis stability by providing more warning time of any attack.

It is important to remember, however, that asymmetrical reductions are not an end in themselves. They are only desirable to the extent that they enhance Western security. In the case of the INF Treaty, asymmetrical reductions in Soviet forces will do just that. But the same cannot be said in the area of short-range nuclear weapons. The "triple-zero" option proposed by General Secretary Gorbachev would also require asymmetrical reductions in Soviet forces, but it already has been rejected by the West. Thus, the benefits of asymmetrical reductions must be weighed on a case-by-case basis. They are not the measure of a sound arms control agreement.

4. Priorities

The new Treaty is a ground-breaker for what the Committee hopes will become a productive new era of arms control agreements. Coupled with effective defense programs, the new accords could bring the United States into a period in which it is unquestionably strong and able to meet any challenges posed by its adversaries, but a period in which dependence upon nuclear weapons has been sharply reduced.

The INF Treaty is admittedly a modest achievement in military terms, but it is a solid success which enhances Alliance security. In political terms, it is certainly a significant, if overdue, success for the North Atlantic Alliance. Moreover, it establishes important precedents for future arms control agreements.

There is every reason to hope and expect that the Treaty will open the way to new successes and that it will add impetus to the quest for new agreements which will indisputably serve the security interests of the United States and its Allies. These are some of the areas of prospective agreement:

START—Negotiations on a new agreement to limit strategic offensive arms began in June 1982. After a hiatus from November 1983, until March 1985, the negotiations became much more intense. At present, there is agreement in principle on a number of key issues, although a number of details, particularly in the area of verification, remain to be resolved. Unlike INF, START will not eliminate categories of weapons, so that the verification tasks are substantially more complex and challenging. This will place heavy demands upon our National Technical Means of verification, which were hampered in the wake of the shuttle disaster.

Much of the success of INF will depend upon whether it, indeed, leads to a solid, comprehensive START agreement. Without such an agreement, the reductions of INF could pale into insignificance if new strategic weapons rachet the arsenals back up again, both in terms of size and potency.

It is to be hoped that the United States and the Soviet Union will have the good sense to exercise restraint in strategic programs. If so, important options will not be foreclosed, and threats will not significantly increase while the details of START are being resolved. Members of the Committee discussed the feasibility of seeking a firmer strategic weapons restraint regime in connection with approval of the INF Treaty, but decided not to take a step which might complicate and burden the INF process.

Conventional Weapons.—Attainment of the INF Treaty underscores the importance of achieving a new agreement reducing conventional forces in Europe. While it will be important to continue efforts to strengthen and modernize NATO forces, it is clear that achievement of an agreement which substantially reduces the threat posed by the Warsaw Pact and enhances the stability in the European theater is now of paramount importance. The West would be derelict if it did not put the Warsaw Pact to the test of being serious about conventional arms control and coming to terms on meaningful conventional arms reductions.

The Mutual and Balanced Forces Talks in Vienna have been in process since 1973 with no concrete results. Nonetheless, important groundwork has been laid for Conventional Stability Talks which could lead to a significant reduction of forces across Europe. Such an accord could, in turn, lead to further reductions in nuclear weapons in Europe, with the result that there could be steady and demonstrable progress in mitigating the threat of war.

Chemical Weapons.—Considerable progress has been made over the past year or so toward agreement on a ban on the production, storage, and deployment of lethal and incapacitating chemical weapons. In 1984, the United States tabled a draft with comprehensive verification provisions, including the requirement for "anytime, anywhere" inspections on demand. There has been much give and take since then in the multilateral discussions at the Conference on Disarmament in Geneva. At present, there appears to be broad agreement in principle, and it seems possible, given the right impetus, to have an agreement to present to the United Nations at a reasonably early date.

The Committee urges the Administration to give very high priority to attainment of a chemical weapons ban. It is important to understand that it would be hard, perhaps impossible, for the West to match the Soviet Union in the area of chemical weapons. Not only does the West have a lesser chemical capability at present, it lags in the development and deployment of effective defenses. Moreover, it is highly questionable whether our allies would ever accept deployment of new chemical weapons, even if they were of the much safer binary type.

The use of chemical weapons in the Iran-Iraq war underscores anew the unfortunate fact that chemical weapons are cheap and relatively easy to make. Clearly, the proliferation of such weapons is in process. Accordingly, the attainment of a ban has become an imperative if the proliferation of such weapons is to be halted. With a ban in place, existing stockpiles would be destroyed by the signatories, and there would be considerable pressure upon nations with existing stockpiles to join in an agreed ban and foreswear such weapons.

Test Ban.—Last year, the Committee approved and reported to the Senate for its advice and consent the 1974 Threshold Test Ban Treaty and the 1976 Peaceful Nuclear Explosions Treaty with the condition that the President certify, prior to ratification, that he had achieved agreement with the Soviets on effective verification measures.

In the past year, the two sides have had detailed and apparently productive talks on verification. Earlier this year, Americans visited a Soviet test site, and Soviet officials visited the Nevada test site. Agreement on mutually acceptable verification procedures at test sites appears within grasp. The Committee strongly endorses the present effort to achieve an early agreement which could be submitted to the Senate for approval.

With the Threshold Test Ban Treaty and the Peaceful Nuclear Explosions Treaty in place, the stage would be set for serious negotiations leading to agreement to reduce the numbers of tests and the allowable yields, aiming toward the achievement of a comprehensive ban.

VII. Reports to the Committee

A. REPORT OF THE MAJORITY LEADER

On February 24, 1988, Majority Leader Byrd testified to the Committee on the visit of a delegation of five Senate leaders to five NATO countries in early February. The delegation was led by Senator Byrd and included Chairman Pell, Senator Sam Nunn, Chairman of the Armed Services Committee, Senator David Boren, Chairman of the Select Committee on Intelligence, and Senator John Warner, Ranking Minority Member of the Committee on Armed Services. The delegation met with heads of government, foreign and defense ministers, and other officials in five NATO capitals—London, Paris, Bonn, Ankara, and Rome—and attended a defense conference in Munich. The Majority Leader explained that the primary purpose of the trip was "to acquire a detailed and unvarnished view of NATO country leaders of the advantages and disadvantages of the INF Treaty." The Majority Leader's testimony appears in the Committee's hearings.

The Majority Leader assessed for the Committee the mood in Europe surrounding the INF Treaty. According to Senator Byrd, "the delegation found a great deal to be optimistic about in Europe. The Alliance, in fact, is in good health, and if it is reexamining those areas of concern and weakness, the atmosphere within which such self-examination is occurring has many positive aspects."

The Majority Leader discussed, in addition to allied views on the INF Treaty, European attitudes on future NATO defense policies and NATO perceptions of future Soviet foreign policy objectives under General Secretary Gorbachev.

Senator Byrd commented on some of the uncertainties in the Alliance as a result of the INF Treaty. He concluded:

> The INF Treaty should be ratified and without reservations requiring renegotiations with the Soviet Union. Although there are differing opinions about the details of how the agreement was handled, and about the specific impact on the military balance and NATO planning for Europe, virtually everyone agreed the Treaty should be ratified. Failure to ratify it would clearly cause a serious crisis in the Alliance, and provide a fertile ground for Soviet mischief-making.

Senator Byrd also addressed the issue of treaty interpretation. He said that as a result of the Administration's position on treaty-making:

> I believe that the Senate will have to take additional formal action on the resolution of ratification to clarify any ambiguities that are now present. After all, the process that this Committee is engaged in, and that the full Senate will shortly be engaged in, has to be grounded in the certainty that the interpretation that the Senate arrives at * * * is fully understood

and will not be susceptible to change after Senate approval is given.

B. SENATE ARMED SERVICES COMMITTEE

Pursuant to an agreement between Chairman Pell and Senators Nunn, Boren, and Majority Leader Byrd, the Committee on Armed Services reported its findings concerning the impact of the INF Treaty on NATO security to the Foreign Relations Committee on March 29, 1988. The full text of that report appears in the Appendix.

One week earlier, Senators Nunn and Warner appeared before the Committee to present their preliminary conclusions to the Committee. Senator Nunn argued that "the INF Treaty can make a modest but useful contribution to NATO security." And Senator Warner argued that, on balance, the INF Treaty, is "in the national security interest of the United States and our Allies."

In its final report, which was approved by a vote of 18–2, the Committee on Armed Services recommended that "the INF Treaty be ratified, subject to certain recommendations covered fifteen separate issues. In his second appearance before the Foreign Relations Committee, Senator Nunn emphasized the importance of five of the issues and accompanying recommendations contained in the Armed Services Committee report.

The first issue highlighted by Senator Nunn is the question of the effect of Article XIV on U.S.-NATO military cooperation. The Armed Services Committee report argues that a condition attached to the Resolution of Ratification on the meaning and effect of Article XIV is not necessary but that "the Committee wishes to state unequivocally its understanding that Article XIV does not in any way constitute a non-circumvention provision, nor does it impose any obligations on the Parties that are not expressed elsewhere in the Treaty."

The second issue is the question of whether the Treaty should be amended to permit conventionally-armed ground-launched cruise missiles. According to its report, the Armed Services Committee "does not believe that an amendment to permit conventional GLCM's of INF range is advisable." However, the report urges "the Administration not to permit the GLCM decision [banning conventional GLCM's] to set a precedent that could adversely affect U.S. national security interests with regard to conventional ALCM's and SLCM's."

The third issue, which the Armed Services report describes as "critical," is the question of whether the INF Treaty covers missiles which destroy their targets through means other than conventional or nuclear warheads. The report recommends that the Administration clarify whether the definition of missiles covered by the INF Treaty (i.e., "weapon-delivery vehicles") covers missiles using future technologies to destroy targets and whether the Administration's definition is shared by the Soviet Union. If the Administration cannot assure the Senate that a common understanding exists between the parties, the Armed Services report recommends "the adoption of an appropriate understanding to provide a clear statement of the U.S. position on the scope of the phrase 'weapon-delivery.' "

The fourth issue highlighted by Senator Nunn relates to the so-called "double negative" in Article VI. Some believe that Article VI can be construed to allow the Soviet Union to produce a stage of a missile that is "interchangeable with" the second stage of the SS-20. The report argues that "the drafting of this provision is technically flawed" and urges the President "to clarify with the Soviet Union the meaning of this provision." Absent such action, according to the report, the Armed Services Committee "may have to recommend that an understanding be added to the Resolution of Ratification to clarify this provision."

The fifth issue highlighted by Senator Nunn relates to the range definition of an INF missile. Because the Treaty defines a missile's range as being the maximum range tested, the possibility exists that the Soviet Union could develop a new missile, test it once above 5,500 kilometers, proceed to conduct all further tests at INF range, and then claim the missile is not an INF missile because it was once tested at strategic range. A related issue is whether a missile tested to strategic range can be reconfigured, then tested at INF range, and still not be covered by the INF Treaty. According to its report, the Armed Services Committee believes the Treaty should not be amended in the hope of preventing this possibility. At the same time, the Armed Services Committee report indicates continued concern about the possibility of a "reconfigured" missile and states that absent further clarification by the Administration, "the Committee may need to recommend an appropriate measure during consideration of the Treaty by the full Senate."

Other issues mentioned in the Armed Services Committee report include GLCM range definition, West German Pershing IA missiles, nuclear warheads, SS-20 chassis, elimination by launch, amendments to the Protocol, force majeure, SS-20 cannisters, challenge inspections, and production monitoring. The Armed Services Committee did not recommend understandings on the Resolution of Ratification related to any of these ten issues.

The Committee carefully weighed the recommendations of the Armed Services Committee on the five key issues outlined by Senator Nunn in his testimony.

Article XIV.—The Committee thoroughly explored the effect of Article XIV on U.S.-NATO weapons cooperation in its own hearings and deliberations. While some were initially concerned about the possibility that the Soviet Union might attempt to exploit this provision to interfere with future NATO nuclear modernization, as a result of extensive and persuasive testimony from Secretary Shultz and Ambassador Glitman, the Committee believes that Article XIV imposes no obligations on the United States beyond those already contained in other articles of the Treaty. Therefore, the Committee agrees with the Armed Services Committee that there is no requirement for Senate action regarding Article XIV. (See *Implications of Article XIV* in Section III).

Conventional GLCM's.—The Committee explored this question during its hearings and considered it during mark-up, when an amendment proposed by Senator Helms to exempt conventional cruise missiles from the INF Treaty was rejected by a vote of 15-3.

As discussed above in Section V(C), an exemption for conventional GLCM's would greatly increase the Committee's concerns regarding the verifiability of the Treaty. Secretary Carlucci warned the Committee that if conventional GLCM's were permitted, "the Soviet ability to maintain an operational nuclear GLCM capability under the guise of a permitted conventionally-armed GLCM program would be high and *would provide the Soviets a ready means of breaking out from the Treaty.*" (Emphasis added.) Moreover, the Joint Chiefs of Staff have not identified a military requirement for conventional GLCM's. Given the lack of a military requirement and the danger of Soviet cheating, the Committee concurs with the Armed Services Committee that amending the INF Treaty to exempt conventional GLCMs would be directly counter to our national security interests.

Article VI "double negative."—The Armed Services Committee report argues that the construction of the text of Article VI could have the unwanted effect of permitting the Soviet Union to claim the right to produce a stage of a missile that is "outwardly similar to and interchangeable with" the second stage of the SS–20.

Ambassador Glitman assured the Committee that the Soviet Union, in no case, can produce a stage of a missile that is "interchangeable" with either the first or second stage of the SS–20. Secretary Carlucci argued that "We do not believe there is a drafting error in this paragraph. * * * a stage which is outwardly similar to, and interchangeable with an SS–20 stage would be a violation of Article VI (1)." An examination of the negotiating history of this provision discloses that the Soviet Union shares the same interpretation of this provision as the Administration—a meeting of the minds was reached.

While the Committee believes this provision is awkwardly phrased in the Treaty, there appears no risk that either Party could justifiably construe the language to permit the production of a stage that is "interchangeable with" the second stage of the SS–20. To achieve the effect feared by some would require that the Treaty be read in a manner that contradicts not only other more central Treaty provisions, but also the Treaty's basic object and purpose. In the Committee's view, the provision is satisfactory as written and further clarification from the Administration or the Soviet Union is not necessary.

Defining the Range of an INF Missile.—During the Committee's hearings, Administration witnesses confirmed that under the INF Treaty the Soviet Union could develop a new missile, test it once at a range above 5,500 kilometers, and then conduct all subsequent tests at INF range. As explained above in "Circumvention Through Strategic Forces" (Section IV), the Committee regards this issue as unfortunate but of relatively minor concern, given the fact that both sides can legally use strategic weapons to cover INF targets. With regard to the related issue of whether a missile tested to strategic range can be reconfigured, tested at INF range, and still not be covered by the INF Treaty, the Administration has indicated that it will treat this issue on a "case-by-case" basis. In the Committee's view, such an approach is satisfactory.

The Definition of a "Weapon-Delivery" Vehicle.—The Committee agrees with the Armed Services Committee that the question of whether the INF treaty covers missiles which use "futuristic" weapons is a critical issue. As explained above in "Missiles With Futuristic weapons" (Section VI), the Administration has told the Committee that "weapon-delivery" applies to any missile that is capable of destroying or damaging a target. This definition would apply to missiles with conventional and nuclear warheads and missiles using futuristic technology. Therefore, in the Committee's judgment clarification from the Soviet Union as to the meaning of "weapon-delivery vehicle," while desirable, is not absolutely necessary.

A letter to Chairman Pell detailing the Administration's view of these five issues is contained in the Appendix.

C. SENATE SELECT COMMITTEE ON INTELLIGENCE

At the request of Senator Pell and the leadership, the Select Committee on Intelligence provided to the Committee, and through the Committee to the Senate, a report on the ability of the United States to monitor and verify compliance by the Soviet Union with the Treaty. The report was adopted by the Select Committee by a unanimous vote on March 21, 1988. On March 22, the Chairman of the Select Committee, Senator David L. Boren, and the Vice Chairman, Senator William S. Cohen, presented unclassified and classified versions of the report to the Committee on Foreign Relations. In addition, Senators Boren, Cohen, and Bill Bradley testified before the Committee in open and closed session regarding the report. The full text of the unclassified report appears in the Appendix. The classified report is available to members through the Select Committee. The complete unclassified testimony of Senators Boren, Cohen and Bradley is included in the printed hearings of the Committee on Foreign Relations on the INF Treaty.

Between September, 1987, and the date of its report, the Select Committee held 15 closed hearings and 17 on-the-record staff briefings, in addition to informal staff briefings and the review of numerous documents. In addition, Select Committee Members and staff traveled to installations where monitoring systems are produced and operated, as well as to the site at Magna, Utah, where portal monitoring by the Soviets will occur.

In meeting its responsibilities, Chairman Boren testified, "the SSCI has explored in depth not only the immediate intelligence issues raised by the Treaty, but also the longer-term implications of the Treaty, including its relationship to future requirements that may be levied against our intelligence capabilities. Accordingly, the Committee specifically considered the requirements that attend any prospective START agreement."

The Committee reviewed the unclassified and classified reports of the Select Committee with care. The 20 findings and recommendations represent a concise and thoughtful assessment of the verification pluses and minuses of the INF Treaty, as well as the challenges which must be addressed in connection with a new Strategic Arms Reduction Treaty. The Committee believes, moreover, that careful attention should be given by the Congress and the Executive Branch to requirements for improvements in our technical collection capabilities and to efficient use of available funds by the intelligence community.

The Committee took particular note of the key summary judgment provided by Senator Boren at the conclusion of his remarks that "there is a very satisfactory level of monitoring capability in terms of the INF Treaty standing alone."

Senator Boren continued:

> We have grave concerns about the ability to monitor even the INF agreement, if a START agreement is superimposed upon it, unless the United States takes adequate steps to modernize and strengthen its technical means in terms of collecting intelligence and assuring compliance, and strengthens its means of detecting other military developments which could take on new significance in a START environment.

In a similar vein, Senator Bradley told the Committee that:

> In conclusion, the INF Treaty is a major milestone on the road toward greater security with fewer nuclear arms. Moreover, it will be effectively verifiable so long as improvements in U.S. national technical means keep pace with any new requirements raised by the START treaty or a future conventional arms reduction agreement.

VIII. COMMITTEE ACTION

On behalf of the United States, President Reagan signed the INF Treaty on December 8, 1987 in Washington, DC. The Treaty, together with two Protocols and a Memorandum of Understanding, was transmitted to the Senate on January 25, 1988, and referred the same day to the Committee on Foreign Relations.

The Committee held public hearings on the Treaty in late January, February, and early March, 1988. During the hearing process, the Committee received testimony from more than 50 witnesses. During the first week of hearings, the Committee heard from top Administration officials and others:

Monday, January 25

The Honorable George P. Shultz, Secretary of State.

Tuesday, January 26

The Honorable Max M. Kampelman, Counselor, Department of State, and Chief U.S. Negotiator, Negotiations on Nuclear and Space Talks.

The Honorable Maynard W. Glitman, U.S. Negotiator on Intermediate-Range Nuclear Arms, Nuclear and Space Talks, Department of State.

Wednesday, January 27

Lt. Gen. Edward L. Rowny (USA-Ret.), Special Adviser to the President and Secretary of State for Arms Control Matters.

The Honorable David M. Abshire, President, Center for Strategic and International Studies and former U.S. Permanent Representative to NATO.

Thursday, January 28

The Honorable Paul H. Nitze, Special Adviser to the President and Secretary of State for Arms Control Matters.

During the second week, the Committee received testimony from the Secretary of Defense, the Chairman and Members of the Joint Chiefs of Staff, and five former Secretaries of Defense. Additionally, the Committee was pleased to hear from a panel, comprised of four European parliamentarians representing the North Atlantic Assembly, which provided a cross-section of informed European opinion on the Treaty. The full list of witnesses during the second week of testimony follows:

Monday, February 1 (morning session)

The Honorable Frank C. Carlucci, Secretary of Defense.

Monday, February 1 (afternoon session)

The Honorable Paul H. Nitze.

Tuesday, February 2

The Honorable Caspar W. Weinberger, former Secretary of Defense.

The Honorable Harold Brown, former Secretary of Defense.

The Honorable James R. Schlesinger, former Secretary of Defense.

The Honorable Elliot Richardson, former Secretary of Defense.

The Honorable Robert S. McNamara, former Secretary of Defense.

Wednesday, February 3 (morning session)

The Honorable Richard R. Burt, American Ambassador to the Federal Republic of Germany.

The Honorable Evan G. Galbraith, former American Ambassador to France.

Wednesday, February 3 (afternoon session)

General John Galvin, Commander in Chief, U.S. European Command, Brussels.

Thursday, February 4

Admiral William J. Crowe, Jr., USN, Chairman of the Joint Chiefs of Staff.

General Carl E. Vuono, Chief of Staff, United States Army.

General Larry D. Welch, Chief of Staff, United States Air Force.

Admiral C.A.H. Trost, Chief of Naval Operations, United States Navy.

General Alfred M. Gray, Commandant, United States Marine Corps.

Friday, February 5 (Subcommittee on European Affairs)

The Honorable Ton Frinking, President of the North Atlantic Assembly and Member of Parliament, the Netherlands.

The Honorable John Cartwright, Member of Parliament, United Kingdom.

The Honorable Francois Fillon, Deputy of the National Assembly, France.

The Honorable Karsten Voigt, Member of the Bundestag, Federal Republic of Germany.

During the latter part of February and early March, the Committee heard from a number of former officials, panels of experts on the Soviet Union, verification and arms control issues, and a variety of other groups and organizations. A list of these witnesses follows:

Tuesday, February 16

The Honorable Richard N. Perle, former Assistant Secretary of Defense.

General Bernard W. Rogers, former Commandar-in-Chief, U.S. European Command.

Walter B. Slocombe, former Deputy Under Secretary of Defense.

Wednesday, February 17 (in executive session)

The Honorable William H. Webster, Director of Central Intelligence.

Lt. Gen. Leonard H. Perroots (USAF), Director, Defense Intelligence Agency.

Lt. Gen. William E. Odom (USA), Director National Security Agency.

Thursday, February 18 (morning session)

Experts Panel on the USSR:

Dr. Marshall Shulman, Adlai E. Stevenson Professor Emeritus of International Relations, Columbia University.

Dr. William Scott, former military attache, U.S. Embassy in Moscow.

The Honorable Raymond L. Garthoff, Senior Fellow, the Brookings Institution, and former Ambassador to Bulgaria.

Thursday, February 18 (afternoon session)

Experts Panel on Verification:

The Honorable William E. Colby, former Director of Central Intelligence.

The Honorable Sidney Graybeal, former U.S. Representative to the Standing Consultative Commission.

Dr. Sidney D. Drell, Professor and Deputy Director, Linear Accelerator Center, Stanford University.

Dr. Joseph D. Douglass, Jr., former Deputy Director, Defense Advanced Research Projects Agency, Department of Defense.

William R. Harris, analyst, Rand Corporation.

Friday, February 19 (morning session)

Experts Panel on Arms Control:

The Honorable Paul C. Warnke, former Director, Arms Control and Disarmament Agency, and former Chief Negotiator, SALT II.

The Honorable Ralph Earle, II, former Chief U.S. Negotiator, SALT II and former Director, Arms Control and Disarmament Agency.

The Honorable Jonathan Dean, former U.S. Representative to the Mutual and Balanced Force Reduction Talks.

The Honorable William Schneider, Jr., Chairman, General Advisory Committee, Arms Control and Disarmament Agency.

Dr. William R. Van Cleave, Professor and Director, Center for Defense Strategic Studies, Southwest Missouri State University.

Friday, February 19 (afternoon session)

Experts Panel on Arms Control:

The Honorable Eugene Rostow, former Director, Arms Control and Disarmament Agency.

The Honorable John Rhinelander, Legal Adviser to the SALT I delegation.

Sven Kraemer, former Director of Arms Control for the National Security Council staff.

Dr. John Steinbruner, Director, Foreign Policy Studies Program, the Brookings Institution.

Monday, February 22 (morning session)

Rabbi David Saperstein, Co-Director, Religious Action Center of Reform Judaism (on behalf of the Union of American Hebrew Congregations, Central Conference of American Rabbis, and the National Jewish Community Relations Council).

Most Reverend Roger Mahony, Archbishop of Los Angeles, on behalf of the U.S. Conference of Catholic Bishops.

Dr. Arie R. Brouwer, General Secretary, National Council of Churches of Christ in the U.S.A.

Nancy M. Newman, President, League of Women Voters.

John T. Joyce, President, International Union of Bricklayers and Allied Craftsmen, on behalf of the AFL–CIO.

Reverend William Sloane Coffin, President, SANE/FREEZE.

Monday, February 22 (afternoon session)

Jerome Grossman, President, Council for a Livable World.

Dr. Anne H. Cahn, Director, the Committee for National Security.

Dr. Edward Teller, Lawrence Livermore National Laboratory.

Burton Yale Pines, Senior Vice President and Director of Research, the Heritage Foundation.

Rear Admiral Robert H. Spiro, Jr. (USNR-Ret.), former Under Secretary of the Army, American Security Council.

Dr. Betty Lall, Director of Arms Control Verification, Council on Economic Priorities.

Martin Colman, Director of Communications, the American Resistance International.

Tuesday, February 23

The Honorable Henry Kissinger, former Secretary of State.

Wednesday, February 24

Reporting on a Senate delegation trip to Europe: Majority Leader Robert C. Byrd.

Thursday, March 3

America's Commitment to Human Rights in the U.S.S.R.: Senator Charles E. Grassley (R-IA).

Monday, March 14

Secretary of State George P. Shultz
Ambassador Paul H. Nitze
Ambassador Maynard W. Glitman
Lt. Gen. Edward L. Rowny (USA-Ret.)

Wednesday, March 16

Panel reporting on "The Public, the Soviets, and Nuclear Arms," and "Public Summit '88," joint projects of the Public Agenda Foundation and the Brown University Center for Foreign Policy Development:

Dr. Howard R. Swearer, President, Brown University.

Daniel Yankelovich, President, Public Agenda Foundation.

Thursday, March 17 (morning session)

Michael J. Matheson, Deputy Legal Adviser, Department of State, accompanied by Ambassador Maynard W. Glitman.

Dr. David F. Forte, Professor of Law and Associate Dean for Academic Affairs, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio.

Thursday, March 17 (afternoon session/open and executive)

Major General William F. Burns, Director-designate, Arms Control and Disarmament Agency.

Dr. Manfred Eimer, Assistant Director, Arms Control and Disarmament Agency.

Tuesday, March 22 (morning session/open and executive)

Report received in open and executive sessions on Intelligence Committee's assessment of the verifiability of the treaty:

The Honorable David L. Boren, Chairman, Select Committee on Intelligence.

The Honorable William S. Cohen, Vice Chairman, Select Committee on Intelligence.

The Honorable Bill Bradley, Member, Select Committee on Intelligence.

Tuesday, March 22 (morning session)

Armed Services Committee's report on NATO Defense and the INF Treaty.

The Honorable Sam Nunn, Chairman, Committee on Armed Services.

The Honorable John W. Warner, Ranking Minority Member, Committee on Armed Services.

(Senators Nunn and Warner also appeared before the Committee during its mark-up session on Monday, March 28th to report on five issues of concern to the Armed Services Committee regarding the INF Treaty.)

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The Committee began mark-up of the Treaty on Tuesday, March 22nd. Additional mark-up sessions were held on Wednesday, March 23rd; Thursday, March 24th; Monday, March 28th; Tuesday, March 29th; and Wednesday, March 30th.

During the mark-up sessions, the Committee conducted the following recorded votes:

—*An Amendment* offered by Senator Helms, which could have exempted conventionally-armed cruise missiles from the coverage of the treaty, was rejected 3–15. Ayes: Senators Helms, Pressler and Murkowski. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Trible, Evans, and McConnell.

—*An Amendment* offered by Senator Helms, which would have extended the coverage of the INF Treaty to include the Soviets' SCUD B missile system, was rejected 2–14. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Boschwitz, Trible, Evans, and McConnell.

—*An Amendment* offered by Senator Helms, which would have prohibited flight tests of any missiles at ranges of 500 to 5,500 kilometers, was rejected 2–14. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Trible, Evans, and McConnell.

—*A Condition* offered by Senator Helms, which would have conditioned the exchange of instruments of ratification on the certification by the President that, in his judgment, the number of SS–20 missiles possessed by the Soviet Union on November 1, 1987, was the number the Soviet Union reported it possessed in the initial data exchange under the Memorandum of Understanding to the proposed treaty, was rejected 2–15. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Trible, Evans, and McConnell.

—*An Amendment* offered by Senator Pressler, which would have provided that the proposed treaty should not be put into effect unless and until the President certified to the Senate that there was parity between the conventional forces of the USSR and Warsaw Pact and those of the United States and NATO, was rejected 2–15. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Trible, Evans, and McConnell.

—*A Condition* offered by Senator Pressler, which would have conditioned ratification on a Presidential certification that the Soviet Union is in complete compliance with the Helsinki Final Act, was rejected 2–16. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Trible, Evans, and McConnell.

—*A Condition* offered by Senator Pressler, which would have conditioned the Senate's advice and consent to ratification on a Presidential certification that any conventional force imbalance (resulting from) the proposed treaty would not jeopardize the security of NATO, was rejected 2–15. Ayes: Senators Helms and Pressler. Nays: Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Trible, Evans, and McConnell.

—*A Condition* offered by Senator Cranston on behalf of Senator Biden, which conditioned the Senate's advice and consent to ratification on the requirement that the INF Treaty be interpreted in accordance with certain constitutional principles, was adopted 12-7. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Helms, and Murkowski. Nays: Senators Lugar, Kassebaum, Boschwitz, Pressler, Trible, Evans, and McConnell.

On March 30, 1988, the Resolution of Ratification, as amended by the condition adopted by the Committee, was ordered favorably reported to the Senate by a vote of 17-2. Those voting aye were Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Trible, Evans, and McConnell. Those voting nay were Senators Helms and Pressler.

IX. TREATY INTERPRETATION (CONDITION ADOPTED BY THE COMMITTEE)

While intent on opposing any unnecessary encumbrance on the resolution of ratification, the Committee felt compelled to address the issue of treaty interpretation. As Senator Cranston put it, the Committee acted on this issue "by necessity, not by choice." The Committee did so by approving a formal Condition which affirms certain constitutional principles relating to the Treaty Power, and requires that these principles govern U.S. interpretation of the INF Treaty.

Some Senators questioned the Committee's need to act on the treaty interpretation issue, particularly in the context of a treaty that will mandate a relatively prompt three-year dismantlement of intermediate-range missiles. Is interpretation of the INF Treaty really an issue? The Committee's answer is affirmative, for three reasons:

—First, the issue is indeed relevant to the INF Treaty. While involving a three-year missile elimination phase, the INF Treaty is designed to ban a defined class of missiles permanently. Thus, the Treaty's limitations and prohibitions will entail the complexities of interpretation and implementation over a period of unlimited duration.

—Second, the issue can hardly be avoided. The Committee could not sidestep the fundamental constitutional question raised by the Administration's recent promulgation of an extraordinary doctrine which asserts wide presidential latitude for changing the interpretation of a treaty, notwithstanding what the Senate may have been told in consenting to ratification. To ignore this question, while dealing with a major treaty, could imply acquiesence in the doctrine.

—Third, the inclusion of a Condition on treaty interpretation represented the least problematic means of handling a potentially grave problem for the INF Treaty. In the absence of a Condition reaffirming traditional principles of treaty interpretation—under which the Senate can accept Executive explanations as having binding significance—the Senate would face the alternative of considering countless other Conditions designed to formalize the Senate's understanding of various INF Treaty provisions.

A. THE TREATY POWER

The Constitution's Treaty Clause (Article II, section 2, clause 2) states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Because treaties constitute solemn international commitments of the United States, and hold domestic status as "supreme Law of the Land," the Senate's shared role in the Treaty Power is a central constitutional provision. As such, it represents a principal means by which the Senate participates in the shaping of American foreign policy.

In the words of Alexander Hamilton, the Framers of the Constitution considered the division of the Treaty Power between the Executive and the Senate to be "one of the best digested and most unexceptional parts of the plan." It would have been "utterly unsafe and improper," Hamilton wrote, to entrust the power of making treaties in the President alone. Hamilton's most famous dictum applied directly to the Treaty Power:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.

The essence of the Treaty Power is that the President and the Senate are partners in the process by which the United States enters into international obligations. It is fundamental to the logic of the Treaty Clause that it does *not* envisage that the President may unilaterally re-make a treaty. If he could, the Senate's portion of the shared power inherent in the Treaty Clause would be nullified.

B. ORIGINS OF THE ISSUE

Last year, in seeking to justify the Administration's "broad" interpretation of the 1972 ABM Treaty, the State Department Legal Adviser, Mr. Sofaer, advanced two claims—one factual, the other constitutional:

> (1) The factual claim is that the entire ABM Treaty, in design, genesis, and implementation, was fraught with ambiguity: ambiguity in what the negotiators agreed to, ambiguity in the text they produced, ambiguity in the Executive presentation to the Senate, ambiguity in the Senate's understanding of the Treaty, and ambiguity in the subsequent practice of the parties.
>
> (2) The constitutional claim is that what the Senate is told in the process of consenting to a treaty is not in itself of binding significance in determining the President's obligation in carrying out the treaty.

The constitutional claim was manifest in a number of statements made by Mr. Sofaer, but none more crystallized the issue for Senators than this assertion, made during joint Foreign Relations-Judiciary Committee hearings in early 1987: "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanation [the Senate] was provided." Questioning how a treaty could be "made" prior to the Senate's consent, Senators grew increasingly concerned about the Administration's concept of the Treaty Power.

In 1987, the Foreign Relations Committee devoted considerable time and attention to the ABM Treaty dispute in both of these dimensions: factual and constitutional.[13] Having done so, the Committee found no reason, while considering the INF Treaty, to debate again the overall validity of the Administration's assertion of a "broad" interpretation of the ABM Treaty as opposed to the traditional "narrow" interpretation. Indeed, in the Committee's view, that issue is being adequately addressed elsewhere:

—First, as to U.S. defense policy in pursuing the development and testing of ABM systems, that issue is now being addressed through the normal give-and-take of the U.S. *defense budget process*. By means of an amendment to the FY 1988-89 DoD authorization, Congress has employed the power of the purse to assert its view, and similar amendments in the future will succeed or fail on the basis of policy debate.

—Second, and even more to the point, it has become patently clear that what is permitted by the ABM Treaty will ultimately be decided by *superpower negotiation*. Such negotiation is virtually inevitable—and the need for it is now part of the Reagan Administration's own position—because the United States, as a precondition of agreeing to major reductions in strategic offensive arms, will be required by self interest to achieve its own clear and detailed understanding of which kinds of Soviet ABM systems to anticipate in the future strategic environment. Any Treaty amendment would, of course, be subject to Senate advice and consent.

In sum, the future of U.S. policy with regard to ABM systems, and U.S. participation in the ABM Treaty, will be addressed in the budget process and in negotiations with the Soviet Union. The Committee was unanimous in believing that its action on the INF Treaty required no resolution of the "broad-versus-narrow" ABM Treaty debate.

The one legacy of that debate which the Committee could *not* overlook, however, was the Administration's *constitutional* assertion of a clearly delineated and unprecedented doctrine under which the President has wide latitude for treaty "reinterpretations," notwithstanding what the Senate may have been told in the course of granting consent to ratification. The Committee was intent upon addressing and refuting this effort at Executive enlargement of its share of the Treaty Power.

As Senator Sarbanes emphasized, "We did not raise this issue to begin with; it was in effect raised to us."

Thus, those who have described the Committee's interest in the treaty interpretation issue as an effort to refight the old ABM battle have missed the point. The Committee is looking forward—to the successful implementation of the INF Treaty and other treaties—and looking backward only to a crucial constitutional provision established 200 years ago, which the Committee feels duty-bound to uphold and affirm.

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[13] For the Foreign Relations Committee's actions and views with regard to the overall ABM Treaty dispute, see the Committee's March-April 1987 joint hearings with the Judiciary Committee, entitled "The ABM Treaty and the Constitution," and the Committee's September 1987 report on S. Res. 167, "The ABM Treaty Interpretation Resolution."

The Committee wishes to acknowledge that in the conduct of those hearings, the drafting of that report, and the creation of the Condition herein described, the Committee received extensive and invaluable assistance from its former legal counsel, Professor Michael J. Glennon.

C. DESCRIPTION OF THE SOFAER DOCTRINE

In defending its new, "broad" interpretation of the ABM Treaty, the Reagan Administration employed a dual-track approach:

(1) In the context of *international* law, it used a new reading of the ABM Treaty text and of internal U.S. Government memoranda from 1971-72 (the "negotiating record" [14]) as a basis for asserting that the two superpowers had not actually agreed to limit the development of any ABM systems based on new technologies.

(2) In the context of *domestic, constitutional* law, it argued that alleged ambiguities in the Treaty text and in the negotiating history had been reflected in the Executive's presentation to the Senate—and buttressed this claim with a newly-minted doctrine which asserted wide Executive latitude for "reinterpretation" of treaties.

The argument of pervasive ambiguity—in the ABM Treaty's design and its presentation to the Senate—would have been sufficient, in terms of *logic,* to assert Executive latitude for a "broad" interpretation of the Treaty. Such an approach would have emphasized that the ABM Treaty was being interpreted "within the bounds of the ambiguity in the original shared understanding" held by the Executive and the Senate, rather than "reinterpreted." [15]

The additional assertion, however, amounted to a new constitutional doctrine—which the Committee will here call the Sofaer Doctrine—that effectively claims *an Executive right of treaty amendment disguised as treaty interpretation.*

The essence of the Sofaer Doctrine is the assertion that the Executive is not bound, in implementing a treaty, by what it has told the Senate in seeking consent to ratification. The Executive is only bound, according to the doctrine, by a particular interpretation of a treaty's meaning if that interpretation meets three criteria: the particular interpretation must have been (1) "generally understood" by the Senate, (2) "clearly intended" by the Senate, and (3) "relied upon" by the Senate.

In a letter dated March 17, 1988 (see Appendix), White House Counsel Culvahouse described these criteria as "settled principles." But in fact they have been asserted with *no* constitutional basis—

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[14] Under international law (and also under domestic law), the primary source of interpretation is the text, which should be interpreted in accordance with the ordinary meaning to be given the treaty's terms in light of their context and in light of the treaty's object and purpose. Another major source of interpretation under international law is practice under the treaty. But the negotiating history—which refers to what happened, as opposed to any particular set of documents—is also recognized as having some interpretive significance insofar as it may reflect what the parties commonly understood about the meaning of the text.

For a discussion of the complexities of defining what a "negotiating record" might be, see the Committee's September 1987 report on S. Res. 167, pp. 49-51. See also *Restatement of the Law (3d), Foreign Relations Law of the United States,* The American Law Institute, 1988; and Reports of the International Law Commission, United Nations, 1966.

[15] Because of its interest in avoiding a renewed debate over the "broad-versus-narrow" interpretation of the ABM Treaty, the Committee will not comment here on its evaluation of the persuasiveness of the factual case for the "broad" interpretation; i.e., the assertion that the ABM Treaty—in genesis, design, and presentation to the Senate—was suffused with ambiguity. The Committee notes only that the assertion of such pervasive ambiguity in the original "shared understanding" of the Treaty, held by the Executive and the Senate, is logically sufficient to make the case for a "broad" interpretation without any need for innovative constitutional assertions.

no reference to the intent of the Framers, to historical precedent, to case law—no reference to any source of constitutional authority. These alleged "principles" have been invented during this Administration, from which they emerged in the course of Mr. Sofaer's various presentations to Congress.[16]

Moreover, while such terms as "generally understood," "clearly intended," and "relied upon" may appear straight forward and appealing, in practice such criteria would be so difficult to meet that the Executive would almost never be bound by its own presentation to the Senate:

—(1) How many Senators must speak on a given interpretation before it can be proven that the Senate "generally understood" that interpretation?

—(2) How, unless the Senate has affirmed a particular interpretation by means of a formal condition, can it ever be demonstrated that the Senate "clearly intended" a particular interpretation?

—(3) And if "relied upon" means (as Administration officials have suggested) that a particular interpretation was crucial to the Senate's action in approving a treaty or refraining from the imposition of a formal condition, how can that negative proposition—"The Senate wouldn't have done x if it weren't for y"—ever be proven?

Yet, under the Sofaer Doctrine, all three of these difficult proofs are required if a particular treaty interpretation is not to be subject to "reinterpretation."

Thus, the Sofaer Doctrine is in effect a claim of wide Executive latitude in treaty interpretation by means of the assertion, in the context of *domestic* law, of unreasonable criteria for what may *not* be "reinterpreted." If a particular interpretation of a particular provision of a treaty does not meet these criteria, it apparently is subject—according to the Sofaer Doctrine—to any interpretation the President may wish to place upon it.

As subsequent discussion will underscore, the import of this assertion is that the Senate is not a partner in the treaty process, but essentially an adversary—an on-looker of secondary status which, while it may derive some momentary power from its ability to block a treaty or impose formal conditions on its consent, must take extraordinary precautions if what it is told by the Executive about a treaty is to be determinative of the Executive's obligations in interpreting and implementing that treaty.

It bears note that there is no necessary relationship between the Sofaer Doctrine and a treaty's "negotiating record." By way of example, one may imagine circumstances in which the Sofaer Doctrine would be asserted but the "negotiating record" would play no role. Let us say that President Reagan's successor and Secretary Gorbachev wished to "reinterpret" the INF Treaty in a manner inconsistent with what the Senate has been told in consenting to ratification. The Sofaer Doctrine would play the role of helping the Administration loosen its obligations under domestic law, while as between the parties there would be no resistance to the new meaning being put on existing words and thus no need to justify the change by reference to a "record." Indeed, under this scenario the "record" would be assiduously disregarded, because it reflected a meaning contrary to that which the parties wished to adopt.

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[16] See, for example, Mr. Sofaer's testimony to the Senate Foreign Relations Committee in the previously cited hearing volume entitled "The ABM Treaty and the Constitution."

Against this background one can examine Mr. Sofaer's provocative declaration that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] was provided."

With the Senate's role denigrated by the Sofaer Doctrine, the essence of a treaty from the U.S. perspective becomes not what the Executive and the Senate jointly understood at the outset but what the Executive at any moment wants to assert was agreed to with the other party. What little constitutional constraint there is on any particular interpretation would require an Executive determination that the Senate has fulfilled the Sofaer Doctrine criteria with regard to that interpretation—criteria the Senate rarely fulfills. Thus, under the Sofaer model, whatever the President can assert within the context of international law acquires a *de facto* supremacy over constitutional law.

There is, of course, a central defect in Mr. Sofaer's supposition that the President unilaterally "makes" treaties which the Senate subsequently is asked to approve. Constitutionally, no treaty is "made" until the Senate has given its consent. This is how a treaty becomes part of "the supreme Law of the Land."

The Legal Adviser's statement implies that the meaning of a U.S.-Soviet treaty is to be gleaned not by examination of what the President and the *Senate* jointly understood, but by examination of what the President and the *Soviets* agreed upon—regardless of what the President may or may not have told the Senate. This is tantamount to saying that a U.S.-Soviet treaty becomes the supreme law of the United States with the advice and consent of the Soviet Union. The Constitution provides otherwise.

D. PROBLEMS WITH THE SOFAER DOCTRINE

The basic problem with the Sofaer Doctrine is that it is founded on the faulty premise that the Senate is not an integral part of establishing the meaning of a treaty under U.S. constitutional law—except insofar as the Senate does so through affirmative steps which impose restrictions on Executive latitude. The doctrine undercuts the basic model of treaty-creation: that the Executive negotiates and signs a treaty,[17] explains its proposed treaty to a listening Senate, and then on that basis is accorded consent to ratify the treaty that has been explained.

Under the Constitution, the President may only ratify a treaty to which the Senate advised and consented. And it must be taken as axiomatic that the Senate cannot consent to that which it did not understand. Accordingly, the operative principle of treaty-making under the Constitution *must* be that, as co-makers of a treaty for the United States, the Executive and the Senate share a common understanding of a treaty which has binding significance domestically as the treaty, upon ratification, becomes an integral part of United States law.

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[17] The signing of a treaty does not bring the treaty into force. Only ratification can do that. Discussion of this and related concepts is contained in the Appendix section entitled "Principles of Treaty-Making and Interpretation."

In the establishment and determination of that common understanding, the concept of legislative intent must be as applicable to treaties as it is to statutory law, in which intent may be explicit or implicit.

Explicit understandings regarding a treaty's meaning are manifest in formal conditions to the Senate's consent. These conditions include amendments to the text of a treaty as well as amendments to the resolution of ratification, such as "reservations," "understandings," and the like.

Implicit understandings represent Senate agreement with and acceptance of the Executive's explanations of the treaty. Whereas explicit understandings may at times entail the Senate's imposition on the Executive of a meaning not originally intended by the Executive, implicit understandings never do; they can only reaffirm the meaning presented by the Executive.

Although not formalized, implicit understandings must necessarily be equal in significance to explicit understandings. To accord them lesser significance would be illogical because implicit understandings commonly occur precisely where there is no disagreement as to meaning and where no issue has arisen. Such understandings are reflected in the various materials traditionally described as legislative history. These sources include hearings and committee reports, as well as debates transcribed into the Congressional Record. Such sources must be regarded as indicia of legislative intent as much for a treaty as for a statute.

What is crucial is that legislative intent, with regard to a treaty as well as a statute, is expressed not only in language drafted by legislators but in unchallenged communications of the Executive. Under longstanding principles of textual construction, Executive communications to the Congress concerning the meaning of a text are evidence of the meaning of that text if Congress (or the Senate) acquiesces in that meaning. In other words, the legislative branch is deemed to be placed on notice by the Executive that certain words will be construed in a certain manner. If Congress wishes a different meaning to obtain, it may act so as to effect that different meaning. If Congress does not act, however, it is properly deemed to have accepted—and to intend—the meaning communicated by the Executive.

In testimony to a joint hearing of the Judiciary and Foreign Relations Committees, Professor Louis Henkin, chief reporter of the new *Restatement of U.S. Foreign Relations Law,*[18] summarized this concept as follows: "Where several [Executive] statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative history of a statute."

Clearly, in determining whether the Senate consented to the ratification of a treaty pursuant to an implicit understanding, a rule of reason must apply. Obviously, where the indicia of Senate intent or understanding (including unchallenged Executive communications or explanations) are few or inconsistent, no implicit Senate intent can reasonably be said to exist. On the other hand, where the indicia of intent (again, including unchallenged Executive communications or explanations) are several and largely consistent, an implicit intent can reasonably be concluded to exist. In such circumstances, the President is bound constitutionally to regard that intent as an implicit Senate understanding, and therefore an implicit condition of the Senate's consent. The Chief Executive cannot bring the treaty into force unless it reflects that condition, and subsequent Presidents must interpret the treaty subject to that intent.

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[18] The full title of this preeminent compendium of U.S. law in the realm of foreign affairs is *Restatement of the Law (3d), Foreign Relations Law of the United States,* 1988.

The essence of the Sofaer Doctrine is to reject this concept of legislative intent as it has been normally understood, and to replace it with a requirement that the Senate act affirmatively to formally demonstrate what is "generally understood, clearly intended, and relied upon" regarding every provision of a treaty, lest that provision be subject to any interpretation a President may later prefer.

E. IMPLICATIONS OF THE SOFAER DOCTRINE

In very practical terms, the Sofaer Doctrine, if accepted, threatens two far-reaching and dangerous consequences:

(1) Nullification of the Senate's Treaty Power. A presidential right to adopt a different interpretation of a treaty, irrespective of the understanding on which the Senate based its consent, would tend to nullify the Senate's share of the Treaty Power and thus undermine a basic provision of the Constitution.

(2) Paralysis in Treaty-Making. The Senate's only recourse, to prevent its share of the Treaty Power being nullified, would be to attach elaborate and numerous conditions to treaties in order to have the Senate's understanding become an integral and explicit part of the ratification documents. Such procedure could easily overburden the treaty process to the point of paralysis.

F. THE INF TREATY AND THE SOFAER DOCTRINE

In the context of the Senate's consideration of the INF Treaty, two letters—from Secretary of State Shultz and from White House Counsel Culvahouse (both reprinted in the Appendix)—became the focus of Senate efforts to deal with the Administration's constitutional assertions.

Some originally saw in the Shultz letter (dated February 9, 1988) an indication of Administration willingness to retreat from its assertion of the Sofaer Doctrine, and thus reacted with disappointment when the doctrine was clearly reasserted in the letter (dated March 17, 1988) signed by White House Counsel Culvahouse. Under analysis, however, it becomes clear that the Administration has remained consistent in its adherence to the Sofaer Doctrine.

Accordingly, the Committee agrees with the Culvahouse letter (as he stated in a brief follow-up letter dated March 22, 1988) that the Shultz and Culvahouse letters are consistent on the question of treaty interpretation. The Shultz letter tiptoed around the Sofaer

Doctrine; the Culvahouse letter simply stated the Administration's views on the Sofaer Doctrine clearly and boldly.

The key to understanding this consistency is to recognize that the Administration conceded virtually nothing in the Shultz letter, which contained only these three items:

> (1) an assertion that Administration testimony on the INF Treaty is "authoritative" (which appears to mean nothing more than dependably accurate);
>
> (2) a kind of admonition that, because of these dependably accurate statements, the Senate need not incorporate Executive materials and testimony in the resolution of ratification—but no clear statement that this or a future Administration would be bound in any legal sense by such an "authoritative" presentation;
>
> (3) a promise that the Reagan Administration would not depart from the meaning of the INF Treaty as presented to the Senate.

These three elements offer absolutely nothing by way of any agreement on principles as to what would bind the Executive. Thus, while the Culvahouse letter seemed to some to be a step backward, in fact it served only to articulate the premises underlying the vague and essentially noncommittal language in the Shultz letter. The essence of the Culvahouse letter is its clear reiteration of the Sofaer Doctrine, which asserts wide Executive latitude for "reinterpretations" by promulgating unreasonable criteria for what provisions in a treaty may not be "reinterpreted":

> As a matter of domestic law . . . the President is bound by shared interpretations which were both authoritatively communicated to the Senate by the Executive and *clearly intended, generally understood and relied upon* by the Senate in its advice and consent to ratification. [Emphasis added.]

In criticizing the draft Biden Condition under consideration by the Committee, the Culvahouse letter agreed that U.S. treaty interpretation must be based on the "shared understanding" of the Executive and the Senate when a treaty is made. But it rejected any notion that such "shared understandings" of binding significance could be found by examining the record of Executive testimony:

> [The Biden Condition] apparently would define that shared understanding as encompassing all statements made by officials of the Executive branch during ratification proceedings. These statements presumably include and attribute equal dignity to the Secretary of State's definitive article-by-article analysis and to the extensive testimony of Cabinet members, treaty negotiators and other Executive branch officials, as well as to the Administration's answers to over 1,000 questions submitted by Members of the Senate, no matter how trivial or unimportant the issue may be to the Senate's advice and consent deliberation.

In testifying to the Foreign Relations Committee, Senator Nunn saw this sentence as casting doubt on the "authoritativeness" of all Executive branch communications concerning the INF Treaty. But in fact the Culvahouse letter does not deny that all Executive branch communications are "authoritative." Rather, it denies that all "authoritative" communications meet the criteria of the Sofaer Doctrine as to what is binding on the Executive.

This confusion apparently rests on Senator Nunn's eminently reasonable premise that "authoritative" testimony *should* have binding significance. But this is a premise that the Administration has never formally acknowledged—in the Shultz letter or anywhere else.[19]

G. PURPOSE AND CONTENT OF THE BIDEN CONDITION

The purpose of the condition drafted by Senator Biden—and offered on his behalf by Senator Cranston—is to reaffirm the long-standing practice and long-standing principle that the "shared understanding" of the Executive and the Senate, as reflected in the Executive's formal representations, is indeed fully binding—as opposed to binding only with regard to those provisions and interpretations which the Senate has gone to extraordinary lengths to brand as crucial to its consent, by formal condition or some other means.

Unlike the Sofaer Doctrine, the Biden Condition envisages the Executive and the Senate not as adversaries in the treaty-making process but as partners—co-makers of the treaty on behalf of the United States.

While both the Biden Condition and the Sofaer Doctrine rest upon the premise that a "shared understanding" is required to bind the Executive to a given interpretation of a treaty, the crucial difference is that the Biden Condition envisages that a "shared understanding" will be reflected in all "authoritative" statements by the Executive. Under the Sofaer Doctrine, the Executive is bound only by those "shared understandings" which the Senate has somehow labeled crucial to its consent by fulfilling the criteria of "generally understood, clearly intended, and relied upon."

The Committee's purpose, in adopting the Condition, was to lead the Senate to affirm a set of principles which reflect long-standing constitutional practice. By so doing, the Senate can:

—avoid the need for other conditions pertaining to specific interpretations of the INF Treaty;

—repudiate a pernicious doctrine that was asserted solely for a specific purpose; and

—establish a position with regard to future treaties such that the Senate can avoid repeating the inclusion of a formal condition. The Senate's 1988 action will have been sufficient to reaffirm fundamental constitutional principles of treaty-making.

The Biden Condition was drafted in consultation with Professor Louis Henkin, chief reporter of the *Restatement of U.S. Foreign Relations Law* and the nation's most generally esteemed scholar in this field. The provision was designed to articulate and affirm, as succinctly as possible, these constitutional principles reflected in time-honored practice: to wit, that the original shared understanding of the Executive and the Senate must govern a treaty's subsequent implementation, and that such understanding is reflected in the Executive's presentation to the Senate.

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[19] One individual exception was Ambassador Nitze, speaking spontaneously. See the final paragraph of this section on "Treaty Interpretation" and also the Appendix of this report.

A key consideration in the drafting of the Condition was to strike an appropriate balance between the general and the specific. As stated earlier, the Committee did not wish to see the Senate fight once again a battle over the Administration's "broad" interpretation of the ABM Treaty. The Committee therefore sought to direct this Condition, to the maximum degree possible, to the INF Treaty. At the same time, however, the Committee's purpose, in addressing the treaty interpretation issue, was not to erect *sui generis* barriers against any "reinterpretation" of the INF Treaty, but to affirm principles that *inherently apply* to the INF Treaty.

The Committee notes that, in one respect, its action in including this Condition in the INF Treaty's resolution of ratification was unnecessary insofar as principles which inherently apply to the INF Treaty would apply even in the absence of any Senate action affirming them. Given the circumstances, however, the Committee judged that to fail to affirm such principles could suggest some degree of acquiesence in the Sofaer Doctrine, which the Committee views as an Executive attempt to assert an unconstitutional arrogation of the Treaty Power. In this sense the Committee views the Biden Condition, paradoxically, as both unnecessary and highly significant.

The Condition, as approved by the Foreign Relations Committee, stipulates as follows:

> That this Treaty shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, section 2, clause 2) for the making of treaties:
>
> (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;
>
> (b) such common understanding is:
>
> (i) based on the text of the Treaty; and
>
> (ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;
>
> (c) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute.

The Condition also stipulates that "This understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise officially conveyed to the other contracting Party."

Several concepts in the Condition warrant discussion:

Text of the Treaty: Both domestic and international law give primacy in treaty interpretation to the text of the treaty. International law requires that a treaty be interpreted in accordance with the ordinary meaning to be given the treaty's terms in light of their context and in light of the treaty's object and purpose. Domestic law does not differ, and is also premised on the assumption that the Executive and the Senate, as co-makers of a treaty for the United States, will share a common understanding of a treaty's text. As a matter of record, that common understanding of the text will be reflected in the Executive's formal presentation of the treaty to the Senate: in formal presentation documents, in prepared testimony, and in verbal and written intercourse regarding the treaty's meaning and effect.

In Professor Henkin's judgment, the phrase "meaning of a treaty" in the original draft Condition included the treaty text. However, in order to underscore that the Biden Condition had not (as alleged in the Culvahouse letter) ignored the primacy of the treaty text as a source of interpretation, the draft Condition was altered at the initiative of Senator Dodd, who worked in consultation with Professor Henkin to refine language that would serve to preempt any further criticism along such lines. Senator Dodd's adjustments in the Condition also served to underscore that the Executive's "authoritative" representations have interpretive significance only insofar as such representations relate to the meaning and legal effect of the treaty text. Thus are excluded the Administration's answers to such questions as "What is the overall effect of the INF Treaty on U.S. security?" and "What will the Administration do to ensure an adequate military balance in Europe?"

As Senator Dodd stressed, this wording "binds the Executive only in those parts of its presentation where it analyzes and explains the text itself, such as 'This is what these words mean.' and 'This is what their effect is under international law' "—in short, where the Executive describes the precise international obligation about to be assumed by the United States.

Authoritative Representations: With regard to what constitutes an "authoritative" representation by the Executive, a rule of reason must apply. Certainly, substantial weight must be accorded the Executive's formal presentation douments, which include the treaty itself and a detailed explanation of the Executive's understanding of the treaty's terms. Considerable weight must also be accorded the prepared testimony of top Executive officials. Additional information elicited during Executive-Senate interaction regarding the meaning and legal effect of treaty terms will also be important because such discussion and questioning will cover items of particular interest and concern to the Senate, as a co-maker of the treaty for the United States. The overall significance of Executive branch representations makes it incumbent upon the Executive to take great care to avoid or remove any inconsistency in its overall presentation of a treaty. The possibility, however, that the Executive may prove fallible—that an "authoritative" representation could, on rare occasion, be inconsistent with the text of the treaty, or with another "authoritative" representation—is simply an unavoidable fact of life, which does not in any way diminish the crucial role of such representations in providing evidence of the common understanding of the text of a treaty held originally by the Executive and the Senate as co-makers of a treaty.

In this context arises the question of the role of the INF Treaty "negotiating record," access to which was afforded Senators not as a part of the Executive's formal or "authoritative" presentation of the Treaty, but in response to a Senate request. This is discussed in the following section, entitled "The INF Treaty Negotiating Record."

Methods for Establishing New Interpretations: As originally drafted, the Biden Condition stated that the United States would not agree to or adopt a new interpretation of the INF Treaty without the "approval of the Senate." That phrase was intended to encompass three possibilities, each of which would legitimately result in the United States adopting a different interpretation of a treaty:

(1) an amendment to the treaty, accomplished by protocol or other means and ratified by the Executive with the advice and consent of the Senate;

(2) a change in the treaty's terms of implementation agreed to by the parties under procedures, and within the framework, established by the treaty as originally ratified with the advice and consent of the Senate; and

(3) a subsequent statute.

In response to a concern expressed by Senator Helms that this should be stated more explicitly, Senator Cranston offered new phrasing which substituted the words, "except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute." Professor Henkin subsequently indicated his judgment that the principle being enunciated had not been altered by the change in language.

With regard to the modality of a statute resulting in a change in U.S. treaty interpretation, the Committee wishes to emphasize that the Condition envisages this possibility not as a matter of advocacy but as a matter of accuracy. In the overwhelming majority of cases, the preferable course for the United States is for the Executive to negotiate an international agreement—a new treaty or a protocol to an existing treaty—which is subsequently ratified with the advice and consent of the Senate. However, as a practical reality, it is a truth of U.S. domestic law that a statute requiring the President to adopt a new interpretation of a treaty is binding on the Executive.[20]

The Committee notes that paragraph (c) of the Condition is essentially a corollary of the principles in paragraphs (a) and (b). The import of paragraphs (a) and (b) is that the Executive must interpret a treaty in accord with the original Executive-Senate "shared understanding" of the treaty, which is reflected in the Executive's presentation to the Senate, and accordingly that the Executive may not, acting alone, adopt an interpretation outside the bounds of that "shared understanding." Paragraph (c) simply spells out the circumstances under which the Executive would receive a mandate to adopt an interpretation outside such bounds.

Non-Conveyance of Condition to the Other Party: A stipulation that the Condition not be conveyed to the Soviet Union as a part of the instruments of ratification was included in the Condition at the initiative of Senator Helms. The Committee viewed this as a matter of underscoring that the Condition is not directed to U.S.

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[20] One example, during the Wilson Administration, involved a congressionally-initiated statute requiring a new U.S. policy that contravened existing international arrangements pertaining to the Panama Canal. In successfully persuading Congress to repeal this legislation, President Wilson argued that the United States is simply "too big and powerful and self-respecting" to put a strained interpretation on its promises.

obligations under international law, which provides the context within which the U.S.-Soviet exchange of instruments of ratification will occur. Rather, the Condition is binding under domestic law, and obtains its binding effect because the President, in the absence of the resolution of ratification, lacks authority to participate in the treaty's ratification. He obtains such authority through the resolution of ratification and is governed by any stipulations by which the Senate conditions its consent.

In sum, the President may not act upon the Senate's consent without honoring this Condition. Nothing that he or his Administration does, by statement or action, whether before or after the act of ratification, can alter the binding effect of any condition which the Senate places upon its consent to treaty ratification. If the President brings the INF Treaty into force, the Condition takes effect.

H. THE INF TREATY "NEGOTIATING RECORD"

Because the Sofaer Doctrine and the "negotiating record" were closely tied in the ABM dispute, some Senators demanded the "record" of the INF Treaty by means of underscoring the point that the Administration's assertions about the role of the Senate in treaty-making had destroyed any basis on which the Senate could operate in confidence of Executive good faith. With the INF Treaty "negotiating record" having been provided under these circumstances, both the Administration and the Senate now face the task of ensuring that Senate review of "negotiating records" does not become an institutionalized procedure.

First, a systematic expectation of Senate perusal of every key treaty's "negotiating record" could be expected to inhibit candor during future negotiations and induce posturing on the part of U.S. negotiators and their counterparts during sensitive discussions.

Second, by seeking possession of the myriad internal Executive memoranda comprising the "negotiating record," the Senate would impose upon itself a considerable task with no clear purpose. Because this "record" does not constitute an agreed account of the negotiations, such documents have no formal standing. Accordingly, regularized efforts to reconcile these "snapshots" of the negotiation process with the resulting treaty text as explained by the Executive would serve only to divert the Senate's attention from the central aim of the ratification process—which is to build, between the Executive and the Senate, a clear "shared understanding" of the treaty text and the obligations which that text entails.

The overall effect—of fully exposed negotiations followed by a far more complicated Senate review—would be to weaken the treaty-making process and thereby to damage American diplomacy.

The traditional approach does not, of course, *preclude* reference to the "record" where such reference can be useful in explaining the effect of treaty provisions which may appear ambiguous or about which questions may arise. The Executive may sometimes wish to initiate such reference to the "record"; on some occasions the Senate may request a detailed account of the interchange which resulted in a particular treaty provision. But this case-by-case approach is far superior to a systematic submission of the "negotiating record," which implies either that treaties tend to be replete with ambiguity or that the Executive cannot be trusted to present an accurate account of the obligations to be assumed by the United States. Neither assumption should be allowed to govern the basic Executive-Senate interaction in the treaty-making process.

Now that the INF Treaty "negotiating record" has been made available to the Senate, the status of these documents requires resolution. In the Committee's view, that resolution would not have been satisfactorily achieved by any stipulation in the resolution of ratification declaring that the Senate had scrutinized the "record" and satisfied itself that the "record" was in harmony with the formal Executive branch presentation of the Treaty. Such an approach could entail three significant problems:

(a) institutionally, it could imply that such scrutiny is important to the Senate's examination of treaties and thus should be institutionalized;

(b) retroactively, it could imply that such scrutiny should have been exercised in the past; and

(c) specifically, with regard to the INF Treaty, it could leave open the question of what is to be done if, in the future, there is an assertion—for example, by a subsequent Administration—that notwithstanding the Senate's perception of harmony there was an inconsistency between the "record" and the Executive presentation.

Accordingly, the Committee believes that no formal finding concerning the contents of the INF Treaty "negotiating record" would be wise. In the Committee's judgment, the status of this "record" is established by the basic principles affirmed in the Biden Condition. If U.S. treaty interpretation is to be based upon the shared understanding of the Senate and the Executive at the time of ratification, and if the common understanding is reflected in authoritative Executive branch statements made in seeking Senate consent to ratification, then sources of interpretation which appear at variance must be subordinated to those authoritative statements.

In sum, although internal Executive memoranda and other negotiating materials may have been available to members of the Senate, some of whom have sought to assure themselves that this "record" is consistent with the Administration's formal presentation, the clear corollary of the constitutional principles cited in the Biden Condition is that such documents need not have been examined for consistency and should not be deemed material to U.S. interpretation of the INF Treaty insofar as they are inconsistent with the Executive branch's formal presentation of the INF Treaty.

I. ADMINISTRATION CRITICISMS OF THE BIDEN CONDITION

The Culvahouse letter (previously cited and reprinted in the Appendix) makes three charges against the Condition, which the Committee has considered but to which the Committee can attach little weight:

(1) *"Changing the Rules of Treaty Interpretation"*

Under this heading, the Administration's position makes two false charges and affirms a false principle.

The false charges are that the Condition (a) ignores the text of a treaty as the primary source of meaning [21]; and (b) accords "equal dignity" to all sources of interpretation, ranging from the Secretary of State's definitive article-by-article analysis to the written answers to hundreds of Senators' questions.

As to the importance of the text, there is no issue. No one disputes that the text of a treaty constitutes the seminal source of the treaty's meaning. (As described previously, at the initiative of Senator Dodd the original draft text of the Condition was revised before Committee approval to underscore this point.) The Condition simply affirms that the Executive must continue to interpret a treaty in accord with the original understanding of that meaning shared by the Executive and the Senate.

As to the weight to be given to various parts of the Executive presentation, there is also no real issue. The Administration's position itself envisages that "the interpretation of a treaty [will be] authoritatively shared with * * *. the Senate." Obviously a rule of reason must apply. As stated above, the text is the central source of meaning. But that meaning is elaborated upon through various elements of the Executive's presentation. The Condition does not state that the treaty is "defined by" the Executive's presentation. Rather, it affirms that the "common understanding" of the two branches is reflected in—meaning evidenced by—authoritative representations by the Executive.

The Administration, however, does not wish to accept this because it wishes to assert broad latitude for subsequent Executive "reinterpretation." It therefore affirms what, under analysis, proves to be a truly radical constitutional principle: that the Executive must adhere to a given interpretation of a treaty *only if* that interpretation was "clearly intended, generally understood, and relied upon by the Senate."

(2) *"Unconstitutional Mechanism for Altering Treaty Interpretation"*

Under this heading, the Administration alleges that the Condition "interferes with the President's constitutional responsibility to interpret and implement treaties and also constitutes an unprecedented arrogation of treaty power by the Senate." This charge is without foundation.

It is indisputable that the President alone bears the constitutional obligation to interpret and implement treaties, and the principles affirmed by the Condition are perfectly consistent with that. What the President does *not* have the authority to do is interpret a treaty in a way that constitutes an amendment. His interpretive action must, if he is to behave constitutionally, be in accordance with the original understanding of the treaty. If he wishes to change the meaning of a treaty, he must obtain the agreement of the other party and formalize the change with the established mechanism of Senate advice and consent.

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[21] As discussed earlier, the first draft of the Biden Condition, which is the object of the Culvahouse letter's criticism, used the phrase "meaning of a treaty" on the premise that this phrase is synonymous with "meaning of the text of a treaty." Thus, the concept and central role of the "text" of a treaty were always implicit in the Biden Condition.

Meanwhile, the President will possess inherent latitude in his capacity as interpreter of every treaty to which the U.S. is a party. In the international context, each such treaty will inevitably provide a measure of flexibility in interpretation and implementation—within the treaty framework. Similarly, in the domestic context, the President will inevitably have latitude for interpretation within the bounds of the "shared understanding" established with the Senate.

(3) "Risk of Unilateral Restrictions on the United States"

Under this heading, the White House letter seeks to raise the specter of the United States being bound by constitutional processes to one interpretation of a treaty while the Soviet Union is free to apply a less restrictive interpretation.

This specter—originally raised by Mr. Sofaer while trying to justify the "broad" ABM Treaty interpretation—is highly theoretical. It is a truism that the Executive has different obligations under domestic and international law, and therefore it is possible to hypothesize situations in which those obligations could conflict. However, in practice this has not proven to be a serious problem and there is no basis for the Administration's assertion that the Condition "would substantially increase this risk." The Condition, after all, does no more than state principles which already suffuse the *Restatement of U.S. Foreign Relations Law.*

An apparent premise of the Sofaer Doctrine is that practical difficulties would ensue if the Executive were bound by what it tells the Senate, because it would not be an abnormal circumstance for a difference to exist between what was agreed to with the other party and the explanations provided to the Senate. There should be no such difference. It is the Executive's responsibility to ensure sufficient clarity in a treaty and in its explanations thereof to the Senate so that no conflict exists between the shared understanding of the parties on the one hand and the shared understanding of the Executive and Senate on the other. If, *in extremis,* such conflict should arise and prove not resolvable by discussion or negotiation with the other party, the United States of course has the option of withdrawing from the treaty.

In sum, this largely theoretical problem should be addressed if and when it arises—not by a preemptive alteration of constitutional principles. The Senate should not accept a doctrine that assumes and protects carelessness or deviousness on the part of the Executive.

J. PROPOSED "COMPROMISES" AND OTHER ALTERNATIVES

The Committee takes note of the assertion that the Committee failed to pursue potential "compromises" that might allegedly have resulted in Committee unanimity on the issue of treaty interpretation. The Committee rejects this assertion as unfounded.

The Committee notes first that when Senator Biden initially drafted the Condition he circulated his text to a number of Senators of both parties in hope of engendering bipartisanship on an issue—the Senate's role in the Treaty Power—that should be of concern to all Senators. Moreover, as Senator Cranston stated when offering the proposal, "I have hoped that this simple language . . . could be adopted unanimously, with the support of Senators on both sides of the aisle. I have worked closely over many weeks with a number of Democratic and Republican Senators on and off this Committee . . . in an effort to work out a bipartisan solution."

As to potential "compromises," the Committee takes note of the following text, submitted by supporters of the Administration as a proposed substitute for the Biden Condition:

> (a) that, as a matter of international law, only the mutual obligations assumed by the parties bind the United States;
>
> (b) that the Senate has relied upon the testimony and written submissions, which it regards as authoritative, of witnesses of the Executive Branch concerning the meaning of the Treaty;
>
> (c) that, as a matter of domestic law, the United States is bound by interpretations which the Senate clearly intended and generally understood would bind the United States in giving its advice and consent;
>
> (d) that, the United States being so bound, no interpretation different from that intended and understood by the Senate, as a matter of domestic law, may be agreed to or adopted by the United States without appropriate legislative action.

The Committee points out that, while somewhat masked, the Sofaer Doctrine is clearly present in paragraphs (b) and (c), which have the effect of asserting that the three Sofaer Doctrine criteria—"generally understood, clearly intended, and relied upon"—must somehow be met lest the Executive have a right of "reinterpretation." In the final analysis, the Committee could hardly be expected to affirm the Sofaer Doctrine in a provision the purpose of which was to refute that Doctrine.

To be sure, various members of the Committee and of the Senate leadership displayed a good-faith willingness to discuss possible compromise language. But no compromise was ever reached. Nor was one possible so long as discussions focused on proposals designed to affirm the Sofaer Doctrine and thereby denigrate the Senate's role in exercise of the Treaty Power.

Senator Cranston summarized the situation as follows: "If we settle for a solution that undermines the Senate's role in the treaty process, we who serve together in the Senate now may well be charged with giving away the Senate's treaty powers."

The basic issue remains. On the one hand are those who view the Executive as constrained in treaty interpretation by the original shared understanding of a treaty as reflected in authoritative explanations of the text provided by the Executive in seeking consent to ratification. On the other are those who wish to affirm a radical new doctrine that has the effect of requiring the Senate to meet certain criteria lest the Executive have latitude to "reinterpret" a treaty provision as he may find convenient.

The Committee wishes to emphasize that in asserting the binding significance of the Executive's original representations, it has articulated the principle with great care. Whereas some formulations would have asserted that the Executive is directly and explicitly "bound by" its representations, the Biden Condition makes no such assertion. Rather, beginning with the premise of Executive-Senate partnership in the making of treaties, it asserts only the binding quality of the original "shared understanding" and then asserts a derivative principle: that this "shared understanding" of a treaty's text is "reflected in"—meaning evidenced by—the Executive's authoritative representations "insofar as such representations are directed to the meaning and legal effect of the text" of the treaty.

This construction helps to underscore that a rule of reason must apply in instances where inconsistencies may appear, lest the Executive be "bound by" two inconsistent requirements. Thus, the Biden Condition is precisely and carefully balanced in seeking to articulate the constitutional principles it aims to uphold.

Finally, the Committee notes that any "compromise" of this basic formulation would have the effect of diluting and thereby perverting the provision's basic purpose. The Committee does not wish to be a party to any act of Executive aggrandizement which, however expedient, would have the effect of impairing the treaty-making process or future American diplomacy. Specifically, the Committee wishes to uphold principles and practices of treaty-making under which the Senate is able to accept the Executive's presentation of a treaty in confidence and approve the treaty in good faith solely on the basis of that presentation, without the obligation of creating an elaborate formal record, or imposing formal conditions, to display what it "generally understood, clearly intended, and relied upon" as a defense against future Executive "reinterpreters."

The only practical alternative to the Biden Condition is to do precisely that: to lade the INF Treaty and its resolution of ratification with an enormous burden of formal amendments, stipulations, conditions, and the like, which could require months of debate. For example, in response to questions, the Administration provided "authoritative" representations regarding a number of issues of direct concern to the Committee, including:

—the meaning of "weapon-delivery" vehicle in Article II;

—the effect of Article XIV on U.S.-NATO weapons cooperation;

—the effect of Article VII on testing of sea-launched cruise missiles; and

—the effect of Article II on the testing of strategic missiles at INF ranges.

Given the context created by the Sofaer Doctrine, however, the Committee could not—without the countervailing effect of the Biden Condition—have been assured that such Administration representations were determinative of the Executive's obligations in carrying out the Treaty. Accordingly, in the absence of the Biden Condition, some Members woud have felt obliged to proposed specific conditions on these and other issues.[22]

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[22] By way of a detailed example, the text of the INF Treaty does not clearly state that a "weapon-delivery" vehicle encompasses missiles using future technologies to damage or destroy targets. Nor does the INF Treaty specifically define a "weapon-delivery" vehicle as a missile

Continued

Senator Nunn articulated this in testimony to the Committee when he noted that in the absence of clear confidence that the Senate could regard Executive testimony as having binding significance, "then of course there are a number of us that feel that we would have to come to the floor of the Senate with a number of amendments that would make it clear that the testimony we received on ambiguities was indeed * * * binding on this Administration and future Administrations."

If the Senate is required to consider formal conditions with regard to every such issue, the result would be indefinite delay, a product which might have been contorted beyond any possibility of U.S.-Soviet ratification, and no resolution at all of the current constitutional issue. Against this prospect, it becomes clear that the Biden Condition is a cautious, responsible, and straightforward means of addressing a complex and potentially grave problem.

As Senator Cranston emphasized during the mark-up, "Adoption of this plain and simple language will liberate us from an exhaustive and absurd obligation to speak in the resolution of ratification to our understanding of every word of the Treaty . . . It allows us to rely on the Administration testimony without the cumbersome, time-consuming process of restating it."

In sum, the two categories of alternatives to the Biden Condition are both undesirable. So-called "compromise" language would be perverse to the degree that it embraced the Sofaer Doctrine. And to delete the Biden Condition would be to lay the resolution of ratification open to a plethora of proposed conditions on the specifics of INF Treaty interpretation.

K. RELATIONSHIP TO ABM TREATY DISPUTE

The Committee points out that its interest in avoiding a replay of the ABM Treaty dispute was manifest in its efforts to make this provision as INF Treaty-specific as possible, through the use of the words "this Treaty," although as indicated earlier the Committee recognized that any assertion of principles would have broader meaning.

The Committee therefore reiterates, that, even if passed by the Senate, this Condition would not be dispositive on the issue of ABM Treaty interpretation because the essential argument used to justify the "broad" interpretation is not an assertion of constitutional principle but a factual claim of pervasive ambiguity. In other words, the Administration's most basic claim is not actually that it is "reinterpreting" that Treaty but that it is interpreting the Treaty within the wide latitude provided by the general ambiguity which, it argues, surrounded the ABM Treaty's meaning at the time of ratification.

Accordingly, as Senator Dodd stressed, "One can vote for [the Biden Condition] and still support the "broad" interpretation of the

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capable of damaging or destroying a target. The Administration provided the Committee with a specific assurance that the United States defines the term "weapon-delivery" vehicle as a missile capable of destroying or damaging a target and that missiles employing futuristic technologies such as lasers would be covered by the INF Treaty. Since the INF Treaty is a permanent treaty, the question of whether it covers missiles using futuristic technologies is a highly relevant concern. Thus, in the absence of the Biden Condition, the Committee might well have attached a condition to the resolution of ratification on this issue.

ABM Treaty because that debate is mostly over facts. You ought to vote against [the Condition] only if you believe that under the Constitution the Executive branch can bring a treaty here, give you an authoritative explanation directed to the meaning of its text, and then after the treaty is ratified return and state that that was not really what the text meant—it meant something else."

In sum, the Biden Condition is not designed to resolve the dispute over alleged ambiguities in the genesis, design, and implementation of the ABM Treaty, or to constitute a final disposition of the issue of Treaty interpretation. Rather, the provision is intended to affirm certain constitutional principles which have been brought into question during the ABM Treaty debate.

At the same time, the Committee wishes to note, on behalf of those who oppose the Administration's "broad" interpretation, that since the issue of Treaty interpretation did not arise during Senate consideration of the ABM Treaty, and was not foreseen at that time, the absence of any action pertaining to interpretation of the ABM Treaty at that time cannot be construed as having any bearing on the interpretation of that Treaty.

L. CONCLUSION: A SUMMARY OF KEY POINTS

In conclusion, the Committee wishes to emphasize what the treaty interpretation issue is and what it is not:

—The issue addressed by the Biden Condition is *not* a struggle over who interprets treaties. It is solely and indisputably the President's responsibility to interpret and implement treaties for the United States. At issue is the question of what limits are to govern the President's latitude in exercising that power.

—The issue is *not* whether and what testimony by the Executive is "authoritative." To answer that question is still to be without an answer as to whether "authoritative" representations are in any way binding on the Executive. The issue is whether and how such representations have a binding significance under United States law.

—The issue is *not* whether to have a "clean" resolution of ratification for the INF Treaty. The issue is how, without burdening the resolution with a *plethora* of formal conditions, the Senate can ensure that the current "shared understanding" of the Treaty, as reflected in what the Executive has told the Senate, becomes determinative of the Treaty's future implementation.

—The issue is *not* the "broad-versus-narrow" interpretation of the ABM Treaty. The issue is the Sofaer Doctrine, which asserts unreasonable, highly elastic criteria which must allegedly be met before the Executive may not "reinterpret" a given treaty provision. To reject the Sofaer Doctrine is not to resolve the ABM Treaty dispute, but simply to narrow it to the confines of a debate over facts: that is, to a debate over alleged ambiguities surrounding that particular Treaty.

—The issue is *not* whether the Executive is to be bound by every last utterance of its representatives before Congress, but whether and how the principle of original "shared understanding" is to govern a treaty's implementation. Shall it be axiomatic that such "shared understanding" is reflected in authoritative Executive representations of the treaty's meaning? Or must the Senate deal with the Executive as an adversary, who will not act in good faith and around whom a cage of explicit stipulations must be built?

—The issue is *not* a Senate effort to chart new constitutional ground, but an Executive effort to do so. It is not the Senate but the Executive which seeks to assert constitutional principles in a manner which expresses an aggressively broad claim on power. An adequate response requires no counter-assertion of Senate power but a simple manifestation, as reflected in the Biden Condition, of Senate unwillingness to acquiesce in Administration assertions which, if not refuted, could imply acceptance of a radical aggrandizement of presidential power. As Senator Kerry put it, "if we do *not* say this, we are acquiescing in a new statement of constitutional principles."

The Committee reiterates its intent that the Senate not digress on this question into a replay of the ABM Treaty dispute. That question is not here at issue, and will not be disposed of even by a Senate affirmation of the principles embodied in this Condition. The real issue, simply put, is this: that those who oppose this Condition are, in effect, proposing to concede to the President a power the Constitution does not grant him, and which neither any previous President nor any previous Legal Adviser has ever asserted.

The Foreign Relations Committee seeks not to make the Senate the interpreter of treaties, but to require that the Executive interpret and implement treaties within the boundaries of the Executive's original presentation in obtaining Senate consent to ratification. Senator Sarbanes put the issue clearly: "I dare say that if Members . . . think about it carefully, I do not think anyone would want an Executive to be able to alter the interpretation of a treaty from the representations that were made to the Senate at the time the Executive sought the Senate's approval." Heretofore, this principle has never been placed at issue, and the Committee urges the Senate to uphold the principle against the current ill-considered and unnecessary challenge mounted by Mr. Sofaer.

Finally, the Committee notes the February 1 exchange—at the outset of hearings on the INF Treaty—between Senator Biden and Ambassador Nitze, during which Ambassador Nitze stated that "an authoritative statement by a member of the Executive branch is determinative as to what the meaning of the Treaty is from the standpoint of domestic law." [23] Had the Administration subsequently been willing in the Shultz letter, the Culvahouse letter, or any other authoritative representation to affirm this principle—and thereby repudiate the Sofaer Doctrine—the question of treaty interpretation would not now be at issue. The issue of treaty interpretation is the Administration's unwillingness to endorse the principle stated by Ambassador Nitze and affirmed more formally and precisely by the Biden Condition.

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[23] This exchange is reprinted in full in the Appendix.

X. ARTICLE-BY-ARTICLE ANALYSIS OF THE INF TREATY

At the request of Chairman Pell, the President's submission to the Senate included what the State Department called a "lengthy" article-by-article analysis of the INF Treaty. According to the State Department, "this analysis was based on a thorough review of the Treaty documents and its negotiating record."

The Administration's article-by-article analysis constitutes a formal Executive representation as to the meaning of the INF Treaty and the obligations to be assumed by the United States under the Treaty.

In addition, at the request of Chairman Pell, the Administration provided the Committee with a classified analysis, based on the negotiating history, of several specific Treaty provisions. This analysis will be stored in the Committee's files.

ARTICLE-BY-ARTICLE ANALYSIS OF THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE ELIMINATION OF THEIR INTERMEDIATE-RANGE AND SHORTER-RANGE MISSILES

STRUCTURE OF THE TREATY

The Treaty consists of a Preamble and 17 Articles. The associated Memorandum of Understanding on Data (the MOU), Protocol on Elimination, and Protocol on Inspection are integral parts of the Treaty.

THE PREAMBLE

The Preamble identifies the United States and the Soviet Union as the Parties to the treaty and contains four paragraphs that set forth the general goals and objectives that the United States and the Soviet Union have agreed are advanced by the elimination of their intermediate-range and shorter-range missile systems.

The first paragraph recognizes that nuclear war would have devastating consequences for all mankind.

The second paragraph notes that the Parties are guided by the objective of strengthening strategic stability.

The third paragraph states the Parties' conviction that the measures set forth in the Treaty will help to reduce the risk of outbreak of war and strengthen international peace and security.

The fourth paragraph acknowledges the obligations of the Parties set forth in Article VI of the Non-Proliferation Treaty.[1]

ARTICLE I—BASIC OBLIGATIONS

Article I sets forth the basic obligations of the Parties to eliminate their intermediate-range and shorter-range missile systems in accordance with the Treaty's provisions, not to have such systems after their elimination, and to carry out the other obligations set forth in the Treaty. This Article also establishes that the MOU and the Protocols on Elimination and Inspection are integral parts of the Treaty.

ARTICLE II—DEFINITIONS

Article II sets forth the definitions of terms used in the Treaty. Definitions are provided for the following terms: (1) ballistic missile and ground-launched ballistic missile (GLBM), (2) cruise missile and ground-launched cruise missile (GLCM), (3) GLBM launcher, (4) GLCM launcher, (5) intermediate-range missile, (6) shorter-range missile, (7) deployment area, (8) missile operating base, (9) missile support facility, (10) transit, (11) deployed missile, (12) non-deployed missile, (13) deployed launcher, (14) non-deployed launcher, and (15) basing country.

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[1] Treaty on the Non-Proliferation of Nuclear Weapons (the NPT), done at London, Moscow and Washington, July 1, 1968, 21 UST 483, TIAS 6839. The United States and the Soviet Union are both parties to the NPT.

Paragraph 1 of Article II defines a "ballistic missile" as a missile that has a ballistic trajectory over most of its flight path. In addition, "ground-launched ballistic missile (GLBM)" is defined as a ground-launched ballistic missile that is a weapon-delivery vehicle.

There are three factors that determine whether a ballistic missile is subject to the Treaty. The first factor is whether the ballistic missile is ground-launched. The second factor is whether the ballistic missile is a weapon-delivery vehicle. The counting rule set forth in paragraph 1 of Article VII specifies that all ballistic missiles of a type that has been flight-tested or deployed for weapon-delivery are considered to be weapon-delivery vehicles. Thus, GLBMs are those types of ground-launched ballist missiles that have been flight-tested or deployed for weapon-delivery, i.e., flight-tested or deployed with any type of warhead device or simulation thereof. The third factor is whether the ballistic missile has a range equal to or greater than 500 kilometers but not greater than 5500 kilometers. Paragraph 4 of Article VII sets forth the criteria for establishing the range capability of intermediate-range and shorter-range GLBMs. The technical data for each existing type of GLBM subject to the Treaty are listed in Section VI of the MOU.

Paragraph 2 of Article II defines a "cruise missile" as a missile that is an unmanned, self-propelled vehicle that sustains flight through the use of aerodynamic lift over most of its flight path. In addition, a "ground-launched cruise missile (GLCM)" is defined as a ground-launched missile that is a weapon-delivery vehicle.

There are three factors that determine whether a cruise missile is subject to the Treaty. The first factor is whether the cruise missile is ground-launched. The second factor is whether the cruise missile is a weapon-delivery vehicle. The counting rule set forth in paragraph 1 of Article VII specifies that all cruise missiles of a type that has been flight-tested or deployed for weapon-delivery are considered to be weapon-delivery vehicles. Thus, GLCMs are those types of ground-launched cruise missiles that have been flight-tested or deployed for weapon-delivery, i.e., flight-tested or deployed with any type of warhead device or simulation thereof. The third factor is whether the cruise missile has a range equal to or greater than 500 kilometers but not greater than 5500 kilometers. Paragraph 4 of Article VII sets forth the criteria for establishing the range capability for intermediate-range and shorter-range GLCMs. The technical data for each existing type of GLCM subject to the Treaty are listed in Section VI of the MOU.

Paragraph 3 of Article II defines a "GLBM launcher" as either a fixed launcher (i.e., non-mobile) or a mobile land-based transporter-erector-launcher mechanism for launching a GLBM. Paragraph 7 of Article VII further states that if a launcher has been tested for launching a GLBM, then all launchers of that type shall be considered to have been tested for launching GLBMs. Paragraph 8 of Article VII specifies that if a launcher has contained or launched a particular type of GLBM, then all launchers of that type shall be considered to be launchers of that type of GLBM. The technical data for each type of GLBM launcher subject to the Treaty are listed in Section VI of the MOU.

Paragraph 4 of Article II defines a "GLCM launcher" as either a fixed launcher (i.e., non-mobile) or a mobile land-based transporter-erector-launcher mechanism for launching a GLCM. Paragraph 7 of Article VII further states that if a launcher has been tested for launching a GLCM, then all launchers of that type shall be considered to have been tested for launching GLCMs. Paragraph 8 of Article VII specifies that if a launcher has contained or launched a particular type of GLCM, then all launchers of that type shall be considered to be launchers of that type of GLCM. The technical data for each type of GLCM launcher subject to the Treaty are listed in Section VI of the MOU.

Paragraph 5 of Article II defines an "intermediate-range missile" as a GLBM or a GLCM having a range capability in excess of 1000 kilometers but not in excess of 5500 kilometers. The existing types of intermediate-range missiles are specified in paragraph 1 of Article III. Their numbers, locations, and characteristics are listed in Sections II, III, and VI, respectively, of the MOU. The criteria for determining the range capability of intermediate-range GLBMs and GLCMs that are not specified as existing types are described in paragraph 4 of Article VIII.

Paragraph 6 of Article II defines a "shorter-range missile" as a GLBM or a GLCM having a range capability equal to or in excess of 500 kilometers but not in excess of 1000 kilometers. The existing types of shorter-range missiles of the Parties are specified in paragraph 2 of Article III. Their numbers, locations, and characteristics are listed in Sections II, IV, and VI, respectively, of the MOU. Criteria for determining the range capability of shorter-range GLBMs and GLCMs that are not specified as existing types are described in paragraph 4 of Article VII of the Treaty.

Paragraph 7 of Article II defines a "deployment area" as a designated area within which intermediate-range missiles, and launchers of such missiles, may operate and within which one or more missile operating based are located. All deployment areas of intermediate-range missiles contain, by definition, at least one missile operating base. Paragraph 5 of Article VIII requires that all deployment areas be specified in the MOU and that their locations or numbers cannot be changed, except as a result of their elimination as provided for in paragraph 8 of Article X. Each deployment area is described by name and boundaries in Section III of the MOU. Pursuant to paragraph 11 of Article II, an intermediate-range missile located within a deployment area is considered to be deployed. An intermediate-range missile located outside of a deployment area is considered to be a non-deployed missile in accordance with paragraph 12 of Article II. As provided in paragraphs 1 and 2 of Article VIII, intermediate-range missiles and their launchers, as well as stages of such missiles, must be located in deployment areas, be located at missile support facilities, or be in transit. Thus, an intermediate-range missile, stage of such a missile, or launcher of such a missile in any other location would be a violation of the Treaty. There are no "deployment areas" for shorter-range missiles; rather, such missiles are deployed only at missile operating bases in order to restrict them to much smaller geographical areas and thus further constrain their operational capability. This additional constraint works to the advantage of the United States since the Soviet Union has a monopoly on deployed shorter-range missiles.

Subparagraph 8(a) of Article II defines a "missile operating base," with respect to intermediate-range missiles, as a complex of facilities located within a deployment area: (a) at which intermediate-range missiles and their launchers normally operate, (b) in which support structures associated with such missiles and launchers are also located, and (c) in which support equipment associated with such missiles and launchers is normally located. Paragraph 5 of Article VIII requires that all missile operating bases be specified in the MOU and that their locations or numbers cannot be changed, except as a result of their elimination as provided for in paragraph 8 of Article X. The location of each intermediate-range missile operating base is provided, along with its center coordinates, in Section III of the MOU. A site diagram of each such missile operating based is appended to the MOU. A missile operating base contains the support structures and support equipment necessary to operate intermediate-range missiles. Definitions of the term "support equipment" and "support structure" are provided in paragraphs 10 and 11, respectively, of Section I of the MOU. In addition, since all missile operating bases for intermediate-range missiles located at missile operating bases are counted as deployed missiles in accordance with paragraph 11 of Article II.

Subparagraph 8(b) of Article II defines a "missile operating base," with respect to shorter-range missiles, as a complex of facilities located at any place: (a) at which shorter-range missiles and their launchers normally operate, and (b) in which support equipment associated with such missiles and launchers is normally located. The location of each shorter-range "missile operating base" is provided, along with its center coordinates, in Section IV of the MOU. A site diagram of each such missile operating base is appended to the MOU. A missile operating base contains the support equipment necessary to operate shorter-range missiles. The definition of the term "support equipment" is provided in paragraph 10 of Section I of the MOU. Since there are no deployment areas for shorter-range missiles, deployed shorter-range missiles are considered to be those shorter-range missiles located at missile operating bases. Paragraph 3 of Article VIII specifies that shorter-range missiles and their launchers may only be located at missile operating bases, be located at missile support facilities, or be in transit from such locations to elimination facilities. A shorter-range missile or launcher in any other location would be a violation of the Treaty.

Paragraph 9 of Article II defines a "missile support facility" as a missile production facility, a launcher production facility, a missile repair facility, a launcher repair facility, a training facility, a missile storage facility, a launcher storage facility, a test range, or an elimination facility. These terms are defined in Section I of the MOU. Paragraph 5 of Article VIII requires that all missile support facilities be specified in the MOU and that their locations, except for elimination facilities, cannot be changed, except as a result of their elimination as provided for in paragraph 8 of Article X. The location of each such facility and its center coordinates are specified in Sections III, IV, and V of the MOU. A site diagram of each agreed missile support facility is appended to the MOU. Intermediate-range missiles and their launchers, as well as shorter-range missiles and their launchers, located at these facilities are considered to be non-deployed missiles and non-deployed launchers, respectively.

Paragraph 10 of Article II defines "transit," with respect to an intermediate-range missile or a launcher of such a missile, as movement between: (a) missile support facilities, (b) a missile support facility and a deployment area, or (c) deployment areas. With respect to a shorter-range missile or a launcher of such a missile, "transit" is defined as movement from either a missile support facility or a missile operating base to an elimination facility. Thus, the only permitted movement of shorter-range missiles is to elimination facilities. Restrictions on the transit of shorter-range missiles complement the other measures that are intended to reduce as quickly as possible the Soviet advantage in the numbers of shorter-range missiles. Pursuant to paragraph 5(f) of Article IX, notifications of transits and information relating to the transit must be provided within 48 hours after the transit is completed. Such notifications will assist in determining whether there has been a violation if a missile is detected outside of deployment areas, missile operating bases, or missile support facilities. All transits must be completed within 25 days in accordance with paragraph 4 of Article VIII. Intermediate-range missiles and shorter-range missiles in transit are counted as non-deployed missiles.

Paragraph 11 of Article II defines a "deployed missile" as an intermediate-range missile that is located within a deployment area or a shorter-range missile that is located at a missile operating base. Article IV requires the reduction and elimination of deployed and non-deployed intermediate-range missiles. Article V requires the elimination of deployed and non-deployed shorter-range missiles.

Paragraph 12 of Article II defines a "non-deployed missile" as an intermediate-range missile located outside of a deployment area or a shorter-range missile located outside of a missile operating base. Paragraph 1 of Article VIII requires that an intermediate-range missile may only be located in deployment areas, be located at missile support facilities, or be in transit. Thus, an intermediate-range missile located at a missile support facility or in transit is considered to be "non-deployed." An intermediate-range missile that is neither deployed (i.e., in a deployment area) nor non-deployed (i.e., at a missile support facility or in transit) would be a violation of the Treaty. As noted above, paragraph 3 of Article VIII states that, until their removal to elimination facilities, shorter-range missiles may only be located at missile operating bases, be located at missile support facilities, or be in transit. A shorter-range missile located at a missile support facility or in transit is considered to be a non-deployed missile. A shorter-range missile that is neither deployed (i.e., at a missile operating base) nor non-deployed (i.e., at a missile support facility or in transit to an elimination facility) would be a violation of the Treaty.

Paragraph 13 of Article II defines a "deployed launcher" as a launcher of an intermediate-range missile located within a deployment area or a launcher of a shorter-range missile located at a missile operating base. Deployed intermediate-range missile launchers are subject to the numerical restrictions and elimination requirements specified in Article IV. Deployed shorter-range missile launchers are subject to the elimination requirements specified in Article V.

Paragraph 14 of Article II defines a "non-deployed launcher" as a launcher of an intermediate-range missile located outside of a deployment area or a launcher of a shorter-range missile located outside of a missile operating base. Thus, "non-deployed launcher" is a term based upon the location of a launcher for intermediate-range missiles or shorter-range missiles. Non-deployed intermediate-range missile launchers are those launchers located at missile support facilities or in transit. They are subject to the numerical restrictions and elimination requirements specified in Article IV. An intermediate-range missile launcher that is neither deployed (i.e., in a deployment area) nor non-deployed (i.e., at a missile support facility or in transit) would be a violation of the Treaty. Non-deployed shorter-range missile launchers are those located at missile support facilities or in transit. They are subject to the elimination requirements specified in Article V. A shorter-range missile launcher that is neither deployed (i.e., at a missile operating base) nor non-deployed (i.e., at a missile support facility or in transit to an elimination facility) would be a violation of the Treaty.

Paragraph 15 of Article II defines a "basing country" as a country, other than the United States of America or the Union of Soviet Socialist Republics, on whose territory U.S. or Soviet intermediate-range missiles or shorter-range missiles, launchers of such missiles, or support structures associated with intermediate-range missiles or their launchers, were located at any time after November 1, 1987. For the purposes of this definition, the term "located" does not include missiles or launchers in transit. The Basing Countries in which U.S. systems subject to the Treaty are located are Belgium, the Federal Republic of Germany, Italy, The Netherlands, and the United Kingdom. The Basing Countries in which Soviet missile systems subject to the Treaty are located are the German Democratic Republic and Czechoslovakia.

ARTICLE III—EXISTING TYPES OF INTERMEDIATE-RANGE MISSILES AND SHORTER-RANGE MISSILES

Paragraph 1 of Article III lists the existing types of intermediate-range missiles of both the United States and the Soviet Union. For the United States, the types of intermediate-range missiles listed as existing are the Pershing II ballistic missile and the GBM-109G cruise missile. For the Soviet Union, the existing types of intermediate-range missiles are the RSD-10 (SS-20) ballistic missile, the RS-12 (SS-4) ballistic missile, and the RS-14 (SS-5) ballistic missile.

Pursuant to Article IV, all intermediate-range missiles of the Parties, along with their launchers, support equipment, and support structures, must be eliminated within three years after entry into force of the Treaty. In addition, paragraph 6 of Article X stipulates that intermediate-range missiles that have been tested prior to the entry into force of the Treaty, but were never deployed and are not listed as existing types in Article III, must be eliminated along with their launchers within six months after the entry into force of the Treaty. Pursuant to this provision, the Soviet Union must eliminate all of its RK-55 (SSC-X-4) intermediate-range cruise missiles and associated launchers. The detailed procedures for eliminating intermediate-range missiles, their launchers, and their associated support equipment and support structures are specified in paragraph 10 of Section II of the Protocol on Elimination.

Paragraph 2 of Article III lists the existing types of shorter-range missiles of both the United States and the Soviet Union. For the United States, the type of shorter-range missile described as existing is the Pershing IA ballistic missile. For the Soviet Union, the existing types of shorter-range missiles are the OTR-22 (SS-12) ballistic missile and the OTR-23 (SS-23) ballistic missile. Pursuant to Article V, all of the existing types of shorter-range missiles of the Parties, along with their launchers and support equipment, must be eliminated within 18 months after entry into force of the Treaty. In addition, paragraph 6 of Article X stipulates that shorter-range missiles that have been tested prior to the entry into force of the Treaty, but were never deployed and are not listed as existing types in Article III, must be eliminated along with their launchers within six months after the entry into force of the Treaty. Pursuant to this provision, the United States must eliminate all of its Pershing IB shorter-range ballistic missiles and associated launchers. The detailed procedures for eliminating shorter-range missiles are specified in paragraph 10 of Section II of the Protocol on Elimination.

ARTICLE IV—REDUCTION AND ELIMINATION OF INTERMEDIATE-RANGE MISSILES

Article IV sets forth the basic obligations for the reduction and eventual elimination of all intermediate-range missile systems.

Paragraph 1 of Article IV requires the Parties to eliminate all intermediate-range missiles, as well as their launchers, support structures, and support equipment, within three years after entry into force of the Treaty. The types of items to be eliminated are listed in Section I of the Protocol on Elimination, while the numbers of such items as of November 1, 1987, are listed in Sections II and III of the MOU. After the three-year elimination period, such missiles, launchers, support structures, and support equipment may not be possessed by either Party. The procedures by which each type of missile, launcher, support structure, and support equipment must be eliminated are set forth in the Protocol on Elimination.

Paragraph 2 of Article IV provides that both deployed and nondeployed intermediate-range missiles, as well as their launchers, support structures, and support equipment, must be reduced and eliminated in two phases. It also provides that such elimination will occur throughout the duration of each phase, thus ensuring that the eliminations will not take place only in the final days of each elimination phase.

Subparagraph 2(a) provides that by the end of the first phase, which will be no later than 29 months after entry into force of the Treaty, each Party must have completed reductions so that:

—the number of its deployed launchers of intermediate-range missiles does not exceed the number of such launchers capable of carrying or containing missiles considered to carry a total of 171 warheads. Since this limit only applies to deployed launchers, only those intermediate-range missile launchers located in deployment areas are affected;

—the number of its deployed intermediate-range missiles does not exceed the number of such missiles considered by the Parties to carry a total of 180 warheads. Since this limit only applies to deployed intermediate-range missiles, only those missiles located in deployment areas are affected. The reason that 180 warheads on deployed missiles will be allowed, but only 171 warheads on deployed launchers, is so that a small number of extra missiles may be located in deployment areas for use as operational spares or for maintenance;

—the aggregate number of its deployed and non-deployed launchers of intermediate-range missiles does not exceed the number that is considered by the Parties to carry a total of 200 warheads. This provision places an aggregate limit on the number of deployed and non-deployed intermediate-range missile launchers that are located in deployment areas, located at missile support facilities, and in transit. Thus, since intermediate-range missile launchers must be either deployed or non-deployed, all intermediate-range missile launchers are subject to reductions in the first phase;

—the aggregate number of its deployed and non-deployed intermediate-range missiles does not exceed the number of such missiles considered by the Parties to carry a total of 200 warheads. This provision limits the aggregate number of deployed and non-deployed missiles to the number of missiles that are considered by the Parties to carry 200 warheads. Thus, there is a limit on the number of intermediate-range missiles that are located in deployment areas, at missile support facilities, and are in transit. Since intermediate-range missiles must be either deployed or non-deployed, all such missiles are thus subject to reductions in the first phase; and

—the ratio of the total number of deployed and non-deployed intermediate-range GLBMS of existing types to the total number of intermediate-range missiles does not exceed the ratio that existed on November 1, 1987. This provision is intended to ensure proportional reductions of the types of intermediate-range missile systems possessed by each Party.

Subparagraph 2(a) of Article IV requires that numerical limits for missiles and launchers be calculated using warhead numbers. To facilitate verification, the number of warheads actually deployed on each missile and launcher is not counted; rather, the number of warheads on missiles and launchers is derived by using the counting rules set forth in Article VII. For missiles, the counting rule in paragraph 6 of Article VII of the Treaty provides that the number of warheads a GLBM or GLCM of an existing type carries is the maximum number of warheads for that type specified in

Section VI of the MOU. For launchers, paragraph 9 of Article VII provides that the number of missiles that each launcher of an existing type of imtermediate-range missile or shorter-range missile is capable of carrying or containing is the number specified for launchers of missiles of that type in Section VI of the MOU.

In sum, 29 months after the entry into force of the Treaty, each Party must not have more deployed intermediate-range launchers than the number considered to carry 171 warheads, not have more deployed intermediate-range missiles than the number considered to carry 180 warheads, not have more combined deployed and non-deployed intermediate-range launchers than the number considered to carry 200 warheads, and not have more combined deployed and non-deployed intermediate-range missiles than the number considered to carry 200 warheads.

Subparagraph 2(b) of Article IV provides that, by the end of the second phase, which will be no later than three years after the entry into force of the Treaty, all intermediate-range missiles, their launchers, support structures, and support equipment of the categories listed in the MOU must be eliminated by the Parties.

ARTICLE V—ELIMINATION OF SHORTER-RANGE MISSILES

Paragraph 1 of Article V provides for the elimination of the shorter-range missiles of each Party, along with launchers of such missiles and associated support equipment, within a single period of 18 months after the entry into force of the Treaty. Thus, there is only one phase for reductions of shorter-range missiles during which shorter-range missiles, their launchers, and associated support equipment must be eliminated. After elimination, the Parties are not permitted to possess any shorter-range missiles, launchers of such missiles, or associated support equipment.

Paragraphs 2 and 3 of Article V restrict the locations of shorter-range missiles and their launchers during the 18-month elimination period. Paragraph 2 requires that, within 90 days of entry into force of the Treaty, each Party move all of its deployed shorter-range missiles, as well as all of its deployed and non-deployed launchers of shorter-range missiles, to the elimination facilities specified in the MOU (or in subsequent data updates) and retain them there until they are destroyed in accordance with Section II of the Protocol on Elimination. Within 12 months after entry into force of the Treaty, each Party shall move all of its non-deployed shorter-range missiles to the elimination facilities specified in the MOU (or in subsequent data updates) and shall retain them there until they are destroyed, in accordance with Section II of the Protocol on Elimination, during the 18-month elimination period. The requirement to move shorter-range missile systems to elimination facilities early in the elimination period is commonly referred to as the "corral" concept.

Paragraph 3 of Article V provides that shorter-range missiles and launchers of shorter-range missiles must not be located at the same elimination facility. Elimination facilities for shorter-range missiles and elimination facilities for launchers of shorter-range missiles must be separated from each other by at least 1000 kilometers.

The locational restrictions in paragraphs 2 and 3 of Article V, together, with those in paragraph 3 of Article VIII, are intended to ensure that shorter-range missiles and their launchers are removed from operational status as soon as possible after entry into force of the Treaty. Given the fact that the Soviet Union has a monopoly on deployed shorter-range missiles, this provision will contribute significantly to NATO's security with respect to the threat posed by shorter-range missiles during the early stages of the implementation of the Treaty.

ARTICLE VI—PRODUCTION AND FLIGHT-TEST BANS

Paragraph 1 of Article VI provides that, upon entry into force of the Treaty and thereafter, neither Party may produce or flight-test any intermediate-range missile, or produce any stages or launchers of such missiles. Paragraph 1 also provides that neither Party may produce, flight-test, or launch any shorter-range missiles, or produce any stages or launchers of such missiles. The term "produce" in this context means any industrial activity involving the construction of one or more missiles, stages, or launchers subject to the provisions of the Treaty. The obligation not to produce intermediate-range and shorter-range missiles, as well as their stages and launchers, prohibits the Parties from producing such items for third parties.

A flight-test ban is a natural element in any treaty that eliminates an entire class of missile systems. It serves to strengthen the production ban. Any covertly produced missile could not be adequately flight-tested without likely U.S. detection. Without realistic testing, a Party's confidence in the operational capability of any covertly-produced missile system would be degraded.

The reason launches of shorter-range missiles are prohibited, but allowed for intermediate-range missiles, is that intermediate-range missiles may be lauched for the purpose of destroying them. Paragraph 5 of Article X provides that, within the first six months after entry into force of the Treaty, each Party has the right to eliminate by means of such launching up to 100 of its intermediate-range missiles. This right is limited to this six-month period in order to preclude prohibited flight-testing under the guise of lauching to destruction. Restrictions and conditions on eliminations by means of launching are provided for in Articles IX and XI of the Treaty and in Section III of the Protocol on Elimination.

Paragraph 2 of Article VI provides that, notwithstanding the paragraph 1 prohibition against producing stages of intermediate-range GLBMs, each Party has the right to produce a type of GLBM not limited by the Treaty even if that missile uses one stage that is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range GLBM having more than one stage. Paragraph 2 further provides that a Party may not produce any other stage that is outwardly similar to, but not interchangeable with, any other stage of an existing type of intermediate-range GLBM. This provision takes into account the outward physical similarity between the first stage of the SS–25 ICBM and the first stage of the SS–20, which is an existing type of intermediate-range GLBM. The effect of paragraph 2 is to make clear that the Treaty does not prohibit the Soviets from continuing to produce the SS-25 ICBM, which is not limited by this Treaty, on the basis that it has a first stage outwardly similar to, but not interchangeable with, the first stage of the SS-20. The United States has a reciprocal right with regard to one stage of its own Pershing missile system should it choose to exercise it. Paragraph 2 prohibits the Parties from producing more than one stage that is outwardly similar to any stage of an existing type of intermediate-range GLBM.

ARTICLE VII—COUNTING RULES

Article VII contains counting rules and type rules that are critical to the operation of the Treaty. Counting rules in arms control agreements provide formal and legally binding recognition by the Parties that specified items will be counted in a certain way. Type rules provide formal and legally binding recognition by the Parties that once a specified object is counted in a certain way, then all objects of that type will be counted in that same way. Such rules are important because they provide a mechanism for verifying compliance with the provisions of an agreement.

Paragraph 1 of Article VII provides that if a ballistic missile or cruise missile has been flight-tested or deployed for weapon delivery, then all missiles of that type will be considered to be weapon-delivery vehicles. When read in conjunction with paragraph 1 of Article II, which defines a ground-launched ballistic missile in terms of a "weapon-delivery vehicle," paragraph 1 of Article VII defines a weapon-delivery vehicle in such a way as to relieve a Party from having to prove that every missile of a particular type has been tested or deployed as a weapon-delivery vehicle; rather, it is sufficient to demonstrate that merely one missile of that type has been flight-tested or deployed as a weapon-delivery vehicle in order to establish for the purpose of the Treaty that all missiles of that type are weapon-delivery vehicles.

Paragraph 2 of Article VII states that if a GLBM or GLCM is an intermediate-range missile, then all GLBM or GLCMs of that type will be considered to be intermediate-range missiles. Similarly, if a GLBM or a GLCM is a shorter-range missile, then all GLBMs or GLCMs of that type shall be considered to be shorter-range missiles.

Paragraph 2 works in conjunction with all of the other Treaty provisions that refer to intermediate-range missiles or shorter-range missiles; it has the effect of a type rule, making such provisions applicable to all GLBMs and GLCMs if a single GLBM or GLCM of that type is an intermediate-range or shorter-range missile. "Intermediate-range missile" and "shorter-range missile" are defined in paragraphs 5 and 6, respectively, of Article II.

Paragraph 3 of Article VII provides that if a type of GLBM is developed and tested solely to intercept and counter objects not on the surface of the Earth, then it will not be considered to be a GLBM subject to the Treaty. Paragraph 3 thus provides an explicit exception to paragraphs 1 and 2 of Article VII, and applies to such ground-launched ballistic missiles as anti-satellite missiles (ASATs), anti-ballistic missile systems (ABMs), and air defense or surface-to-air missiles (SAMs).

Paragraph 4 of Article VII establishes criteria for defining the range capability of GLBMs and GLCMs not specified in Article III. For purposes of the Treaty, the range capability of a GLBM not listed in Article III is defined as its maximum tested range. The range capability of a GLCM not listed in Article III is defined as the maximum distance it can cover, while flying in its standard design mode, before it runs out of fuel. Distance is calculated by projecting the flight path of the GLCM onto the Earth's sphere from the point of launch to the point of impact.

Paragraph 4 also describes intermediate-range missiles and shorter-range missiles in terms of their range capability. A shorter-range GLBM or GLCM is a missile with a range capability equal to or greater than 500 kilometer but not greater than 1000 kilometers. An intermediate-range GLBM or GLCM is defined as a missile with a range capability greater than 1000 kilometers but not greater than 5500 kilometers.

Paragraph 5 of Article VII provides that the maximum number of warheads considered to be carried by an existing type of intermediate-range missile or shorter-range missile is the number of warheads specified for missiles of that type in Section VI of the MOU. The specification of the number of warheads associated with an existing type of intermediate-range missile is necessary in order to calculate compliance with the warhead limits pertaining to intermediate-range missiles provided for in Article IV.

Paragraph 6 of Article VII provides that each GLBM or GLCM will be considered to carry the maximum number of warheads for a missile of that type specified in Section VI of the MOU. Thus, when the Parties apply paragraph 2 of Article IV to determine whether they have sufficiently reduced the warheads on intermediate-range missiles to meet their obligations for the first phase of reductions, they will use the maximum number of warheads associated with that type of intermediate-range missile as specified in Section VI of the MOU.

Paragraph 7 of Article VII provides that if a launcher has been tested for launching a GLBM or a GLCM, then all launchers of that type will be considered to have been tested for launching GLBMs or GLCMs, respectively. This paragraph works in conjunction with the Treaty provisions that refer to the testing of GLBM launchers or GLCM launchers; it has the effect of a type rule, making such provisions applicable to all launchers of a given type if a single launcher of that type has been tested to launch a GLBM or a GLCM, respectively. "GLBM launcher" and "GLCM launcher" are defined in paragraphs 3 and 4, respectively, of Article II.

Paragraph 8 of Article VII provides that if a launcher has contained, or has launched, a particular type of GLBM or GLCM, then all launchers of that type will be considered to be launchers of that type of GLBM or GLCM, respectively. This paragraph has the effect of a type rule. Thus, if one launcher of a type has been tested for launching a GLBM or a GLCM, then all launchers of that type will be considered GLBM or GLCM launchers, respectively, and thus will be subject to the Treaty.

Paragraph 9 of Article VII provides that each launcher of an existing type of GLBM or GLCM will be considered capable of carrying or containing the number of missiles specified in Section VI of the MOU for that type of launcher. Thus, when the Parties apply paragraph 2 of Article IV to determine whether they have sufficiently reduced the warheads associated with intermediate-range missile launchers, they will use the number of GLBMs or GLCMs that the launcher of that type is considered capable of carrying, as specified in Section VI of the MOU, and, pursuant to paragraph 5 of Article VII which provides the warhead counting rule for GLBMs and GLCMs, multiply that number times the maximum number of warheads associated with that type of GLBM or GLCM, as specified in Section VI of the MOU.

Paragraph 10 of Article VII provides counting rules for GLBMs and GLCMs. These rules define how GLBMs and GLCMs are accounted for under the terms of the Treaty. The purpose of these provisions is to facilitate verification of compliance with the Treaty by identifying those features of the missile systems most easily observable by national technical means of verification.

Subparagraph (a) of paragraph 10 states that, for GLBMs stored or moved in separate stages (such as the Pershing II), the longest stage of an intermediate-range or shorter-range GLBM will be counted as a complete missile. This means that each longest stage of such a GLBM will be counted as one complete missile. The Protocol on Elimination requires, however, that all stages of existing types of GLBMs be eliminated.

Subparagraph (b) of paragraph 10 of Article VII provides that, for GLBMs not stored or moved in separate stages (such as the SS-20), a canister of the type used in the launch of an intermediate-range GLBM will be counted as a complete missile, unless a Party proves to the satisfaction of the other Party that the canister does not contain such a missile. This means that such a GLBM canister will be counted as one complete GLBM. This canister counting rule serves an important verification purpose. Soviet missiles typically are kept in canisters. By virtue of this rule, if the United States detects a canister subject to the provisions of the Treaty, it will be entitled to consider that canister to contain a missile of the type associated with that canister, unless the Soviet Union can demonstrate to the satisfaction of the United States that the canister does not contain such a missile. Such a demonstration could involve on-site inspection, national technical means of verification, or cooperative measures. Absent such a Soviet demonstration, each Soviet canister counts as one missile for purposes of Treaty limitations. Also, pursuant to the Protocol on Elimination, canisters of prohibited types of intermediate-range and shorter-range missiles must be eliminated along with their associated missiles. In addition, subparagraph (b) of Article 10 provides that, for GLBMs not stored or moved in separate stages, an assembled intermediate-range or shorter-range GLBM shall be considered a completed missile.

Subparagraph (c) of paragraph 10 states that, for GLCMs, the airframe of an intermediate-range or shorter-range GLCM will be counted as a complete missile. This means that the airframe of a GLCM will be counted as if it were a complete missile.

Paragraph 11 of Article VII provides that a ballistic missile not intended for use in a ground-based mode will not be considered to be a GLBM subject to the Treaty if: (a) it is test-launched at a test site from a fixed, land-based launcher that is used solely for test purposes, and (b) its launcher is distinguishable from GLBM launchers subject to the Treaty. Similarly, a cruise missile not intended for use in a ground-based mode shall not be considered to be a GLCM subject to the Treaty if: (a) it is test-launched at a test site from a fixed, land-based launcher that is used solely for test purposes, and (b) its launcher is distinguishable from GLCM launchers subject to the Treaty. These exceptions are necessary to permit the land-based testing of items not subject to the Treaty, such as submarine-launched ballistic missiles (SLBMs) and sea-launched cruise missiles (SLCMs).

Paragraph 12 of Article VII gives each Party the right to produce and use existing booster stages in order to create booster systems with ranges between 500 and 5500 kilometers. This provision permits each Party to produce and use booster stages that otherwise might, because of the range to which the booster system is launched and the payload that is tested, be considered for the purposes of the Treaty to be intermediate-range or shorter-range missiles. In this regard, if a ballistic missile or cruise missile is not a weapon-delivery vehicle, then pursuant to paragraph 1 or 2, respectively, of Article II it is not subject to the provisions of the Treaty. Paragraph 12 is essential to permit the United States to continue on-going research on advanced concepts for strategic reentry vehicles and defensive systems.

Paragraph 12 further provides that launches of such booster systems will not be considered to be flight testing of intermediate-range and shorter-range missiles as long as four conditions are met. First, the stages used in such booster systems must be different from stages used in those missiles listed as existing types of intermediate-range or shorter-range missiles in Article III. Second, the booster systems must be used only for research and development purposes to test objects other than themselves. Third, the total number of launchers for such booster systems must not exceed 35 at any one time for either Party. Fourth, the launchers for such booster systems must be fixed and emplaced above ground. Such launchers must be located only at research and development launch sites that are specified in Section VII of the MOU. Such research and development launch sites are not subject to inspection pursuant to Article XI of the Treaty. Paragraph 6 of Article IX, however, provides that each party must notify the other Party, at least ten days in advance, of the scheduled date and location of the launch of a research and development booster system as described in this paragraph. The purpose of such a notification is to enhance the verification by national technical means of such launches.

ARTICLE VIII—LOCATION AND TRANSIT

Article VIII sets forth locational restrictions both for intermediate-range missiles and their launchers and for shorter-range missiles and their launchers. In addition, Article VIII limits the movement of missiles and launchers subject to the provisions of the Treaty. The ability to verify compliance is enhanced if there are restrictions on the location and movement of Treaty-limited items during the period in which they are being eliminated.

Paragraph 1 of Article VIII provides that all intermediate-range missiles and their launchers must be: (a) located in deployment areas, (b) located at missile support facilities, or (c) in transit. Intermediate-range missiles or their launchers may not be located elsewhere. The terms "deployment areas," "missile support facility," and "transit" are defined in paragraphs 7, 9, and 10, respectively, of Article II; the locations of deployment areas and missile support facilities of intermediate-range missiles are specified in Section III of the MOU, and notification of missiles and launchers in transit is required pursuant to subparagraph 5(f) of Article IX.

Paragraph 2 of Article VIII requires that stages of intermediate-range missiles must be: (a) located in deployment areas, (b) located at missile support facilities, or (c) moving between deployment areas, between missile support facilities, or between deployment areas and missile support facilities. Paragraph 2 complements paragraph 1 of Article VIII by placing restrictions similar to those for intermediate-range missiles on stages of such missiles. The terms "deployment area" and "missile support facility" are defined in paragraphs 7 and 9, respectively, of Article II; the locations of deployment areas and missile support facilities of intermediate-range missile systems are specified in Section III of the MOU.

Paragraph 3 of Article VIII provides that all shorter-range missiles and their launchers, until their removal to elimination facilities as required by paragraph 2 of Article V, must be: (a) located at missile operating bases, (b) located at missile support facilities, or (c) in transit. Paragraph 10 of Article II requires that such transit can only be to elimination facilities. Shorter-range missiles or their launchers may not be located elsewhere. The terms "missile operating base," "missile support facility," and "transit" are defined in paragraphs 8, 9, and 10, respectively, of Article II, and the location of such bases is specified in Section IV of the MOU.

Paragraph 4 of Article VIII provides that the transit of a missile or launcher must be completed within 25 days. To facilitate verification of compliance with this provision, paragraph 5(f) of Article IX provides for notification of such transits within 48 hours after they have been completed. Such notification must include the location of the transiting missile or launcher once every four days during that transit.

Paragraph 5 of Article VIII states that all deployment areas, missile operating bases, and missile support facilities are specified either in the MOU or in subsequent updates of data provided pursuant to paragraphs 3, 5(a), or 5(b) of Article IX of the Treaty. Also, paragraph 5 of Article VIII provides that neither Party will increase the number of, or change the location or boundaries of, deployment areas, missile operating bases, or missile support facilities from those set forth in the MOU. Elimination facilities are excepted from this prohibition in order to give each Party the flexibility to determine the most appropriate elimination site(s) during the three-year elimination period. Finally, paragraph 5 provides that a missile support facility will not be considered to be part of a deployment area even if it is located within such an area. Missiles, stages, and launchers located at missile support facilities are considered to be non-deployed. If a missile support facility located within a deployment area were considered to be part of the deployment area, then any missiles, stages, or launchers located at that facility would be deployed, rather than non-deployed.

Paragraph 6 of Article VIII provides that, beginning 30 days after entry into force of the Treaty, neither Party may locate: (a) intermediate-range missiles, (b) stages of intermediate-range missiles, (c) launchers of intermediate-range missiles, (d) shorter-range missiles, (e) stages of shorter-range missiles, or (f) launchers of shorter-range missiles at missile production facilities, launcher production facilities, or test ranges specified in the MOU. This means that, after the 30-day period, locating a missile, a missile stage, or a launcher at a production facility or test range would be a violation. By providing that missiles, launchers, and stages may not be located in locations at which such items would be produced or tested, paragraph 6 makes compliance with the Treaty prohibitions on production and testing easier to verify.

Paragraph 7 of Article VIII provides that neither Party may locate any intermediate-range missiles or shorter-range missiles at training facilities. The prohibition against locating missiles at training facilities is designed to guard against covert operation of those missiles at such facilities.

Paragraph 8 of Article VIII provides that a non-deployed intermediate-range or shorter-range missile may not be carried on, or be contained within, a launcher for such a type of missile, except as required for maintenance conducted at repair facilities or for elimination by means of launching conducted at elimination facilities. This provision is designed to help ensure that non-deployed missiles are not covertly operational during the elimination period.

Paragraph 9 of Article VIII provides that training missiles as well as training launchers for intermediate-range missiles and for shorter-range missiles are subject to the same locational restrictions as for intermediate-range and shorter-range missiles and launchers of such missiles that are provides for in paragraphs 1 and 3 of Article VIII. This means that training missiles and training launchers for intermediate-range missiles must be located in deployment areas, be located at missile support facilities, or be in transit, while training missiles and training launchers for shorter-range missiles must be located at missile operating bases, be located at missile support facilities, or be in transit to elimination facilities. Since some training systems are not readily externally distinguishable, particularly by national technical means of verification, from actual missiles and launchers, the requirement that they be located at the same facilities as operational systems helps to ensure that operational systems will not be covertly deployed under the guise of training systems.

ARTICLE IX—DATA EXCHANGES AND NOTIFICATIONS

Article IX sets forth the basic obligations for the data exchanges and notifications associated with the elimination of intermediate-range and shorter-range missile systems. These data exchanges and notifications are of unprecedented scope and represent an important verification measure.

Paragraph 1 of Article IX states that the MOU contains categories of data relevant to the Treaty's obligations and that it lists all of the intermediate-range and shorter-range missiles, as well as their launchers, support structures, and support equipment, possessed by the Parties as of November 1, 1987. Paragraph 1 requires that updates of that data and notifications required by this Article be provided according to the categories contained in the MOU. While the data is updated in each category, the MOU itself, as well as its categories, does not change.

Paragraph 2 of Article IX requires that updates of data and notifications be provided through the Nuclear Risk Reduction Centers. As stated above, the Centers were established pursuant to the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Establishment of Nuclear Risk Reduction Centers of September 15, 1987.

Paragraph 3 of Article IX provides that, not less than 30 days after the entry into force of the Treaty, each Party will provide the other Party with updated data, as of the date of the entry into force of the Treaty, for all categories of data contained in the MOU. Since parargraph 1 of Article IX requires that the data in the MOU be current as of November 1, 1987, paragraph 3 provides the mechanism by which the information initially provided by the MOU if updated for the period between November 1, 1987, and the date of the entry into force of the Treaty. It is this updated data that lists the inventory of items to be eliminated under the Treaty.

Paragraph 4 of Article IX requires that, following the entry into force of the Treaty, each Party must provide updated data for all categories in the MOU at six-month intervals. The updated data must be provided not later than 30 days after each six-month interval. The updates must inform the other Party of all changes, completed and in process, that have occurred during the six-month interval. The updates must also inform the other Party of the "net effect" of those changes.

Paragraph 5 of Article IX sets forth additional notification requirements imposed on each Party. These requirements will apply throughout the life of the Treaty.

Subparagraph 5(a) requires notification, not less than 30 days in advance, of the scheduled date of elimination of a specific deployment area, missile operating base, or missile support facility. Paragraph 8 of Article X calls for the elimination of deployment areas, missile operating bases, and missile support facilities. Upon elimination, former missile operating bases and former missile support facilities (except missile production facilities) will continue to be subject to "short-notice" on-site inspections, in accordance with paragraph 5 of Article XI, until 13 years have elapsed after the entry into force of the Treaty.

Subparagraph 5(b) requires notification, not less than 30 days in advance, of changes in the number or location of elimination facilities, including the location and date of a scheduled change. Elimination facilities, being a type of missile support facility, must themselves be eliminated pursuant to paragraph 8 of Article X.

Subparagraph 5(c) requires notification, not less than 30 days in advance, of the scheduled date of the initiation of the elimination of intermediate-range and shorter-range missiles, stages and launchers of such missiles, and support structures and support equipment associated with such missiles and launchers. Such notifications must include the following five items:

—the number and type of items of missile systems to be eliminated;

—the elimination site;

—the location from which intermediate-range missiles, their launchers, and support equipment will be moved to the elimination site;

—except in the case of support structures, the point of entry to be used by an inspection team conducting an "elimination" inspection pursuant to paragraph 7 of Article XI; and

—the estimated time of departure of the inspection team from the point of entry to the elimination facility.

Launches of intermediate-range missiles for the purposes of their elimination do not require notifications in accordance with subparagraph 5(c); rather, notice of such eliminations by launching must be provided in accordance with subparagraph 5(d) below.

Subparagraph 5(d) requires notification, not less than ten days in advance, of the scheduled date of the launch, or the scheduled date of the initiation of a series of launches, of intermediate-range missiles for the purpose of their elimination pursuant to paragraph 5 of Article X. Such notifications must include the following information:

—the type of intermediate-range missiles to be eliminated;

—the location of the launch. If the elimination is by a series of launches, the location and number of such launches;

—the point of entry to be used by an inspection team conducting an "elimination" inspection pursuant to paragraph 7 of Article XI of the Treaty; and

—the estimated time of departure of the inspection team from the point of entry to the elimination facility.

Subparagraph 5(e) requires notification of changes, within 48 hours after they occur, in the number of intermediate-range and shorter-range missiles, as well as their launchers, and support structures and support equipment associated with such missiles and launchers, resulting from elimination. Such notifications must include the following information:

—the number and type of items of a missile system that were eliminated; and

—the date and location of the elimination.

Subparagraph 5(f) requires notification of the transit, not more than 48 hours after it has been completed, of intermediate-range missiles or shorter-range missiles or launchers of such missiles, or the movement of training missiles or training launchers for intermediate-range missiles or shorter-range missiles. Such notifications must include the following information:

—the number of missiles or launchers that were moved;

—the points, dates, and times of departure and arrival;

—the transport used; and

—the locations, and time at that location, at least once every four days during the period of transit.

Paragraph 6 of Article IX requires notification, not less then ten days in advance, of the scheduled date and location of the launch of a research and development booster system as described in paragraph 12 of Article VII. This provision facilitates monitoring, which helps to ensure that missile systems subject to the Treaty will not be covertly tested under the guise of research and development boosters.

ARTICLE X—ELIMINATION

Article X sets forth the basic obligations for the elimination of items or facilities whose destruction is required by the Treaty. Details concerning the elimination of specific items are provided in the Protocol on Elimination. This elimination regime helps to ensure that all elimination required by the Treaty will, in fact, be performed.

Paragraph 1 of Article X requires that each Party eliminate its intermediate-range and short-range missiles, launchers of such missiles, and associated support structures and support equipment in accordance with the procedures set forth in the Protocol on Elimination.

Paragraph 2 of Article X provides that on-site inspection of the elimination of items of missile systems specified in the Protocol on Elimination must take place in accordance with Article XI of the Treaty, the Protocol on Inspection, and the Protocol on Elimination.

Paragraph 3 of Article X requires that when intermediate-range missiles, their launchers, and associated support equipment are removed from deployment areas to elimination facilities, they must be removed in complete deployed organizational units. For the United States, such organizational units are batteries of Pershing II ballistic missiles and flights of BGM–109G cruise missiles. For the Soviet Union, such organizational units are SS–20 ballistic missiles regiments composed of two or three battalions. Elimination by complete organizational units will aid in verification of the elimination process.

Paragraph 4 of Article X provides that the elimination of intermediate-range and shorter-range missiles, launchers of such missiles, and associated support equipment must be carried out either at the elimination facilities specified in the MOU or at new elimination facilities specified in the MOU or at new elimination facilities identified in accordance with subparagraph 5(b) of Article IX. If such items are eliminated in accordance with Section IV (i.e., elimination *in situ*) or section V (i.e., elimination through loss, accidental destruction, or static display) of the Protocol on Elimination, then they need not be eliminated at the facilities specified in the MOU or at the facilities as to which notification was made in accordance with subparagraph 5(b) of Article IX. Support structures, associated with Treaty-limited missiles or launchers, that are subject to elimination must be eliminated *in situ*.

Paragraph 5 of Article X permits each Party to eliminate, within the first six months after the entry into force of the Treaty, up to 100 intermediate-range missiles by means of launching. Section III of the Protocol on Elimination requires that such missiles must be launched from designated launch sites to existing impact areas. The purpose of the six-month time limit is to reduce any potential conflict between this means of elimination and the flight-test ban provided for in paragraph 1 of Article VI.

Paragraph 6 of Article X requires that certain intermediate-range and shorter-range missiles, and launchers of such missiles, must be eliminated within six months after the entry into force of the Treaty, if such missiles meet the following three criteria: (a) they were tested prior to the entry into force of the Treaty, (b) they were never deployed, and (c) they are not listed as existing types in Article III of the Treaty. Such missiles must be eliminated in accordance with the procedures set forth in the Protocol on Elimination. These missiles are, for the United States, the Pershing IB shorter-range ballistic missile, and, for the USSR, the RK-55 (SSC-X-4) intermediate-range cruise missile.

Paragraph 7 of Article X provides that elimination of intermediate-range and shorter-range missiles, launchers of such missiles, and associated support structures and support equipment will be considered to have occurred after completion of the procedures set forth in the Protocol on Elimination and upon receipt of the notification required in subparagraph 5(e) of Article IX.

Paragraph 8 of Article X requires that each Party eliminate its deployment areas, missile operating bases, and missile support facilities. It is important to understand that *all* deployment areas, missile operating bases, and missile support facilities that are listed in the MOU or, in the case of elimination facilities, those identified by means of a subsequent data update, must be eliminated pursuant to paragraph 8. A Party must notify the other Party, pursuant to subparagraph 5(a) of article IX of the Treaty, of the date of the eliminations, but only after three conditions have been fulfilled. The conditions that must be met before notification can be given are as follows:

—all intermediate-range and shorter-range missiles, launchers of such missiles, and associated support equipment have been removed from such areas, bases, or facilities;

—all support structures associated with such missiles and launchers located at such areas, bases, or facilities have been eliminated; and

—all activities related to production, flight-testing, training, repair, storage, or deployment of such missiles and launchers have ceased at such areas, bases, or facilities.

Paragraph 8 of Article X further provides that such deployment areas, missile operating bases, and missile support facilities will be considered to be eliminated either when they have been inspected pursuant to paragraph 4 of Article XI (i.e., there has been a "close-out" inspection) or when 60 days have elapsed since the date of the scheduled elimination (for which notification was provided pursuant to subparagraph 5(a) of Article IX). Thus, inspection of eliminated locations is a right available to both Parties, but such inspections are not required by the Treaty. A deployment area, missile operating base, or missile support facility that met the three conditions specified above prior to entry into force of the Treaty, and which was not included in the initial data exchange update made in accordance with paragraph 3 of Article IX of the Treaty, will be considered to have been eliminated. Pursuant to paragraph 3 of Article XI, any such location will be subject to an on-site "baseline" inspection in order to determine whether, in fact, it was eliminated.

Paragraph 9 of Article X provides that if a Party intends to convert a missile operating base listed in the MOU for use as a base associated with GLBM or GLCM systems not subject to the Treaty, then that Party shall notify the other Party, no less than 30 days in advance of the scheduled date of the initiation of the conversion, of the scheduled date and the purpose for which the base will be converted. However, while such a missile base can be converted, such a base must nevertheless be eliminated pursuant to paragraph 8 of Article X above. Conversion is not a substitute for elimination under the Treaty.

ARTICLE XI—ON-SITE INSPECTION

Article XI sets forth the plan for on-site inspections the Parties will conduct to assist in the verification of compliance with the Treaty. This Article provides for several different types of inspections, including "baseline" inspections (paragraph 3), "close-out" inspections (paragraph 4), "short-notice" inspections (paragraph 5), continuous "portal monitoring" inspections (paragraph 6), and "elimination" inspections (paragraphs 7 and 8). "Elimination" inspections conducted pursuant to paragraph 7 are the only on-site inspections that an Inspecting Party is obliged to carry out. All of the other types of inspections specified in this article are at the option of the Inspecting Party. Except for continuous portal monitoring, missile production facilities are not subject to any type of on-site inspection. This decision was made at the insistence of the United States for reasons of national security. Details concerning the procedures for each type of inspection are provided in the Protocol on Inspection.

Paragraph 1 of Article XI provides that, for the purpose of facilitating verification of compliance with the Treaty, each Party has the right to conduct on-site inspections in accordance with this Article and the Protocols on Inspection and Elimination.

Paragraph 2 of Article XI provides that such inspections may take place within the territory of each Party and within the territories of the Basing Countries, i.e., Belguim, the Federal Republic of Germany, Italy, The Netherlands, the United Kingdom, the German Democratic Republic, and Czechoslovakia. The Basing Country Agreement between the United States and the five Allied Basing Countries (i.e., Belguim, the Federal Republic of Germany, Italy, The Netherlands, the United Kingdom) provides the consent of the Allied Basing Countries to have inspections conducted within their respective territories pursuant to Article XI and the Protocol on Inspection.

Paragraph 3 of Article XI sets forth the parameters of "baseline" inspections. These inspections are for the purpose of helping to verify the updated data exchanged pursuant to paragraph 3 of Article IX. Beginning 30 days after the entry into force of the Treaty, these inspections will afford each Party an opportunity to inspect all missile operating bases and missile support facilities (other than missile production facilities) specified in the MOU, as well as an opportunity to inspect all elimination facilities listed in the updated data. These inspections must be completed within 90 days after the entry into force of the Treaty. Thus, within 30 days after entry into force of the Treaty, the Parties will exchange updated data and, within 90 days after entry into force, conduct inspections to help verify the updated data. The procedures for a "baseline" inspection are set forth in Section VII of the Protocol on Inspection.

Paragraph 4 of Article XI provides for the "close-out" inspection of bases and facilities once they are declared to have been eliminated. It establishes the right to confirm by on-site inspection the elimination of missile operating bases and missile support facilities, except missile production facilities, for which notification of elimination was provided pursuant to subparagraph 5(a) of Article IX. "Close-out" inspections must be carried out within 60 days after the scheduled elimination date in order to confirm that such elimination did in fact take place. Once such bases and facilities are eliminated, they are, as former facilities, subject to the "short-notice" inspections provided for in subparagraph 5(b) of this Article rather than those provided for under subparagraph 5(a) of this Article. If a Party conducts an inspection pursuant to paragraph 3 of this Article (i.e., a "baseline" inspection) after the scheduled date of elimination of a particular facility, then no "close-out" inspection will be permitted. The procedures for a "close-out" inspection are set forth in Section VII of the Protocol on Inspection.

Paragraph 5 of Article XI provides each Party with the right to conduct two types of "short-notice" inspections for a period of 13 years after entry into force of the Treaty. Such inspections are referred to as "short-notice" because, like "baseline" and "close-out" inspections, they require that an inspection team be transported to the inspection site no later than nine hours after the inspection team specifies which particular site it wishes to inspect. The "short-notice" inspection differs from "baseline" and "close-out" inspections because it is based on a quota system and is available to the Parties for 13 years after the Treaty enters into force. The two types of "short-notice" inspections are:

(a) beginning 90 days after entry into force of the Treaty, each Party has the right to inspect missile operating bases and missile support facilities other than elimination facilities and missile production facilities. The purpose of these inspections is to ascertain the numbers of missiles, launchers, support structures, and support equipment located at the missile operating base or missile support facility that is being inspected; and

(b) each Party has the right to inspect former missile operating bases and missile support facilities eliminated pursuant to paragraph 8 of Article X of the Treaty, other than former missile production facilities. This inspection right includes former missile operating bases that, in accordance with paragraph 9 of Article X, has been converted for a use not limited by the Treaty after November 1, 1987. This inspection right is extended to such converted bases because they must nevertheless be eliminated pursuant to paragraph 8 of Article X.

The Parties have the right to conduct a total of 20 of the inspections described in subparagraphs (a) and (b) above per calendar year during the first three years after entry into force of the Treaty, 15 such inspections per year during the subsequent five years, and ten such inspections per year during the last five years. Thus, each Party will have an opportunity to conduct up to 185 such inspections over the course of 13 years. Neither Party may use more than half of its total number of inspections per year within the territory of any one Basing Country. The procedures for a "short-notice" inspection are set forth in Section VII of the Protocol on Inspection.

Paragraph 6 of Article XI provides the Parties with certain continuous monitoring inspection rights for a period of up to 13 years after entry into force of the Treaty. These types of inspection are referred to as "portal monitoring." Each Party has the right to inspect by such portal monitoring:

(a) the portal of any facility of the other Party at which the final assembly of GLBMs that use missile stages, any one of which is outwardly similar to a stage of an existing type of solid-propellant GLBM subject to the Treaty, is accomplished. Subparagraph (a) is necessary because of the close physical similarity between the first stage of the SS–25 ICBM and the first stage of the solid-propellant SS–20 intermediate-range GLBM; or

(b) if a party has no facility of the type described in subparagraph (a) above, the portal of an agreed former missile production facility at which existing types of intermediate-range or shorter-range GLBMs were produced. The existing types of GLBMs are specified in Article III.

The Party whose facility is to be inspected pursuant to paragraph 6 must ensure that the other Party is able to establish a permanent continuous portal monitoring system at that facility within six months after entry into force of the Treaty or within six months of initiation of the process of final assembly described in subparagraph (a) above. If, after the end of the second year after entry into force of the Treaty, a Party does not conduct the process of final assembly described in subparagraph (a) for a period of 12 consecutive months, then neither Party will have the right to inspect by means of continuous monitoring any missile production facility of the first Party unless the process of final assembly as described in subparagraph (a) is initiated again.

Finally, paragraph 6 specifies that, upon entry into force of the Treaty, such facilities to be monitored are: for the United States, Hercules Plant #1, at Magna, Utah (as specified in the site diagram in the MOU), and, for the Soviet Union, the Votkinsk Machine Building Plant, Udmurt Autonomous Soviet Socialist Republic, Russian Soviet Federative Socialist Republic. Both stages of the Pershing II intermediate-range GLBM were produced at the plant at Magna, Utah, while the SS–25 ICBM and the SS–20 intermediate-range GLBM have been assembled at the plant at Votkinsk. Paragraph 6 further specifies that the plant at Magna, Utah, will be monitored in accordance with subparagraph (b) above, while the plant at Votkinsk will be monitored in accordance with subparagraph (a) above. The procedures for a "portal monitoring" inspection are set forth in Section IX of the Protocol on Inspection.

Paragraph 7 of Article XI requires the inspection of the process of elimination of intermediate-range and shorter-range missiles, launchers of such missiles, and associated support equipment to be carried out at elimination facilities in accordance with Article X of the Treaty and the Protocol on Elimination. Such inspections are required and include the obligation to inspect the elimination of intermediate-range missiles by means of launching. Inspections made pursuant to this paragraph are for the purpose of determining whether the specified elimination processes have, in fact, been carried out. As stated above, the "elimination" inspections provided for in paragraph 7 are the only required on-site inspections specified in Article XI. Such "elimination" inspections are required in order to help ensure agreement between the Parties concerning the elimination of items and the status of the inventory of items subject to the Treaty. The procedures for an inspection pursuant to paragraph 7 are set forth in Section VIII of the Protocol on Inspection.

Paragraph 8 of Article XI establishes the right of the Parties to conduct inspections to confirm the completion of the process of elimination of items that are eliminated pursuant to Section V of the Protocol on Elimination. Section V of the Protocol on Elimination sets forth the procedures for elimination by loss or accidental destruction as well as by static display. Paragraph 8 also establishes the right of the Parties to confirm the completion of the process of elimination of training missiles, training missile stages, training launch canisters, and training launchers that ae eliminated pursuant to Section II, IV, and V of that Protocol. The procedures for an inspection pursuant to paragraph 8 are set forth in Section VIII of the Protocol on Inspection.

ARTICLE XII—NATIONAL TECHNICAL MEANS OF VERIFICATION

Paragraph 1 of Article XII states that, to help ensure compliance with the treaty, each Party will use the national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

National technical means include a broad range of systems for collecting intelligence. Such systems include reconnaissance satellites, ships and aircraft that are used to monitor Soviet missile tests, and ground stations, such as the United States large phased-array radar on Shemya Island in Alaska.

In subparagraph (a) of paragraph 2, the Parties state their commitment not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

In subparagraph (b) of paragraph 2, the Parties are prohibited from using any concealment measures that impede verification by national technical means of compliance with the Treaty. This provision is broader than similar provisions in earlier U.S.-Soviet arms control agreements, which merely prohibited *deliberate* concealment measures. This prohibition does not apply to cover or concealment practices that both occur within a deployment area and are associated with normal training, maintenance, and operations, including the use of environmental shelters to protect missiles and launchers.

Paragraph 3 of Article XII provides a unique measure to enhance observation by national technical means of verification. It establishes the right of each Party to request, and the obligation of the other Party to carry out, certain cooperative measures to improve verification by reconnaissance satellites. This right will exist until either a strategic offensive arms reduction and limitation agreement enters into force between the Parties or three years after entry into force of the Treaty, whichever occurs first. The cooperative measures relate to deployment bases for road-mobile GLBMs capable of a range in excess of 5500 kilometers (and thus not limited by the Treaty), which are not former missile operating bases eliminated pursuant to paragraph 8 of Article X and subsequently converted pursuant to paragraph 9 of Article X. The Party making a request for cooperative measures must inform the other Party of the deployment base at which such measures shall be implemented. The following measures must be carried out by the Party whose base is to be observed:

(a) not later than six hours after a request, the Party must have opened the roofs of all fixed structures for launchers located at the base, must have completely removed all missiles on launchers from such fixed structures, and must have displayed such missiles on launchers in the open without using concealment measures; and

(b) the Party must leave the roofs open and the missiles on launchers in place until 12 hours after receipt of a request for such an observation.

Paragraph 3 further provides that each Party may make six such requests for cooperative measures per calendar year, and that only one deployment base may be subject to such cooperative measures at any one time. Paragraph 3 is designed to help verify that mobile SS–20 intermediate-range missiles are not covertly deployed at bases for mobile SS–25 ICBMs. Under the terms of the Treaty, SS–25 bases that were not formerly declared SS–20 bases are not subject to on-site inspection. SS–25 bases that were formerly declared SS–20 bases will be subject to on-site inspection. The United States currently does not have bases that would be affected by this provision.

ARTICLE XIII—SPECIAL VERIFICATION COMMISSION

Paragraph 1 of Article XIII provides that, in order to promote the objectives and implementation of the provisions of the Treaty, the Parties have established the Special Verification Commission. At the request of either Party, the Parties will meet, within the framework of that Commission, to: (a) resolve questions relating to compliance with the obligations assumed under the Treaty, and (b) agree upon such measures as may be necessary to improve the viability and effectiveness of the Treaty.

Paragraph 2 of Article XIII provides that the Nuclear Risk Reduction Centers be used by the Parties to: (a) exchange data and provide notifications (as required by paragraphs 3, 4, 5, and 6 of Article IX of the Treaty and the Protocol on Elimination); (b) provide and receive the information required by paragraph 9 of Article X of the Treaty (relating to the conversion of a missile operating base); (c) provide and receive notifications of inspections as required by Article XI of the Treaty and the Protocol on Inspection;

and (d) provide and receive requests for cooperative measures as provided for in paragraph 3 of Article XII of the Treaty.

ARTICLE XIV—NO CONFLICTING OBLIGATIONS

Article XIV records the Parties' undertaking to comply with the Treaty and not to assume any international obligations or undertakings that would conflict with the provisions of the Treaty. This provision thus reflects the duty of each Party under customary international law to comply with the Treaty (i.e., *pacta sunt servanda*). This provision does not impose any additional obligation on the Parties, nor does it broaden the interpretation of other obligations in the Treaty. This provision refers only to the assumption of obligations in the future, and existing agreements are therefore unaffected. Article XIV will not affect existing patterns of defense collaboration or cooperation with our Allies. Nor with this provision preclude cooperation with our Allies in modernization.

ARTICLE XV—DURATION AND WITHDRAWAL

Paragraph 1 of Article XV provides that the Treaty is of unlimited duration. The Treaty is of unlimited duration because it eliminates two entire classes of weapon-delivery systems, rather than merely place limitations on them for a specified period of time.

Paragraph 2 of Article XV contains the "supreme interests" withdrawal clause that is a standard provision in most modern arms control agreements. It establishes the right of a Party to withdraw from the Treaty if it concludes that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Withdrawal under this provision requires a six-month advance notification and a statement of the extraordinary events that the notifying Party regards as having jeopardized its supreme interests. This right of withdrawal is in addition to any other rights a Party has under customary interational law regarding termination or suspension of the Treaty, including its rights in the event of a material breach of the Treaty.

ARTICLE XVI—AMENDMENTS

Article XVI provides that each Party may propose amendments to the Treaty and that any agreed amendments will enter into force in accordance with the procedures set forth in Article XVII governing the entry into force of the Treaty. In this regard, it should be noted that the Protocols on Elimination and Inspection provide that technical changes to those Protocols necessary to improve their viability and effectiveness shall not be considered amendments to the Treaty.

ARTICLE XVII—ENTRY INTO FORCE

Paragraph 1 of Article XVII provides that the Treaty, including the MOU and the two Protocols (which are integral parts of the Treaty), is subject to ratification in accordance with the constitutional procedures of each Party and will enter into force on the date of the exchange of instruments of ratification.

Paragraph 2 of Article XVII states that the Treaty will be registered with the United Nations pursuant to Article 102 of the United Nations Charter.

FINAL PROVISIONS

The final paragraph of the Treaty records that the Treaty was done at Washington on December 8, 1987, in two copies, each in the English and Russian languages, both texts being equally authentic.

ARTICLE-BY-ARTICLE ANALYSIS OF THE MEMORANDUM OF UNDERSTANDING REGARDING THE ESTABLISHMENT OF THE DATA BASE FOR THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE ELIMINATION OF THEIR INTERMEDIATE-RANGE AND SHORTER-RANGE MISSILES

STRUCTURE AND OVERVIEW OF THE MEMORANDUM OF UNDERSTANDING

The Memorandum of Understanding (the MOU) consists of a Preamble and seven Sections.

The MOU provides the detailed data that are required to be exchanged between the Parties pursuant to Article IX of the Treaty. It is arranged by categories, and lists the location of deployment areas, missile operating bases, and missile support facilities, as well as the numbers of missiles, launchers, support structures, and support equipment at those locations. The MOU also lists the technical parameters of each missile system, providing information on missiles, launchers, support structures, and support equipment limited by the Treaty.

The data that appear in the MOU reflect the intermediate-range and shorter-range missile systems of the Parties as of November 1, 1987. Pursuant to paragraphs 3 and 4 of Article IX of the Treaty, the initial update of this data will occur within 30 days of the entry into force of the Treaty, and will be subject to "baseline" onsite inspections provided for in paragraph 3 of Article XI of the Treaty. Thereafter regular updates will occur at six-month intervals. Pursuant to paragraph 5 of Article IX of the Treaty, a variety of other notifications will be exchanged as Treaty-regulated events occur.

The data exchange in the MOU surpasses other such exchanges in previous U.S.-Soviet arms control agreements. Given its scope and detail, the data exchange reflected in the MOU is itself an achievement.

THE PREAMBLE

The Preamble states that, pursuant to and in implementation of the Treaty, the Parties have exchanged data, current as of November 1, 1987, on intermediate-range and shorter-range missiles and their launchers, as well as on support structures and support equipment associated with those missiles and launchers.

SECTION I—DEFINITIONS

Section I sets forth the definitions of certain terms used in the MOU, the Treaty, the Protocol on Elimination, and the Protocol on

Inspection. Section I provides definitions for the following terms: (1) missile production facility, (2) missile repair facility, (3) launcher production facility, (4) launcher repair facility, (5) test range, (6) training facility, (7) missile storage facility, (8) launcher storage facility, (9) elimination facility, (10) support equipment, (11) support structure, and (12) research and development launch site. Each of these terms represents a type of facility, structure, or site that is referred to in the MOU.

Paragraph 1 of Section I defines a "missile production facility" as a facility for the assembly or production of solid-propellant intermediate-range or shorter-range GLBMs, or existing types of GLCMs. Production of missiles subject to the Treaty is prohibited by paragraph 1 of Article VI of the Treaty. In accordance with paragraph 6 of Article VIII, missiles subject to the Treaty or stages of such missiles may not be located at missile production facilities 30 days after the entry into force of the Treaty. Pursuant to paragraph 9 of Article II of the Treaty, a missile production facility is considered to be a "missile support facility" for purposes of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Missile production facilities are not subject to inspections except—in certain cases—for continuous portal monitoring pursuant to paragraph 6 of Article XI.

Paragraph 2 of Section I defines a "missile repair facility" as a facility at which repair or maintenance of intermediate-range or shorter-range missiles takes place, other than inspection and maintenance conducted at a missile operating base. This definition is necessary because missiles undergoing repair are nevertheless subject to the limitations of the Treaty. Pursuant to paragraph 9 of Article II of the Treaty, a missile repair facility is considered to be a "missile support facility" for purposes of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Missile repair facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 3 of Section I defines a "launcher production facility" as a facility for final assembly of launchers of intermediate-range or shorter-range missiles. This paragraph is the corollary of paragraph 1 of this Section, except that it defines production facilities for launchers rather than for missiles. Production of launchers subject to the Treaty is prohibited by paragraph 1 of Article VI of the Treaty. In accordance with paragraph 6 of Article VIII, launchers may not be located at launcher production facilities 30 days after entry into force of the Treaty. Pursuant to paragraph 9 of Article II of the Treaty, a launcher production facility is considered to be a "missile support facility" for purposes of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Launcher production facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 4 of Section I defines a "launcher repair facility" as a facility at which repair or maintenance of launchers of intermediate-range or shorter-range missiles takes place. The definition excludes a missile operating base in which inspection and maintenance is conducted. This paragraph is a corollary to paragraph 2 of this Section. Pursuant to paragraph 9 of Article II of the Treaty, a missile repair facility is considered to be a "missile support facility" for purposes of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Launcher repair facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 5 of Section I defines a "test range" as an area at which flight-testing of an intermediate-range or shorter-range missile takes place. Flight-testing of missiles subject to the Treaty is prohibited by paragraph 1 of Article VI of the Treaty. In accordance with paragraph 6 of Article VIII, missiles and launchers subject to the Treaty may not be located at test ranges 30 days after entry into force of the Treaty. Pursuant to paragraph 9 of Article II of the Treaty, a test range is considered to be a "missile support facility" for purposes of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Test ranges are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 6 of Section I defines a "training facility" as a facility, not located in a missile operating base, at which personnel are trained in the use of intermediate-range or shorter-range missiles or launchers of such missiles and at which launchers of such missiles are located. Pursuant to paragraph 9 of Article II, a training facility is considered to be a "missile support facility" for purposes of the Treaty. Pursuant to paragraph 7 of Article VIII of the Treaty, neither Party shall locate intermediate-range or shorter-range missiles at training facilities. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Training facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 7 of Section I defines a "missile storage facility" as a facility at which intermediate-range or shorter-range missiles, or stages of such missiles, are stored. The definition excludes any such facility located at a missile operating base. Pursuant to paragraph 9 of Article II of the Treaty, missile storage facilities are considered to be "missile support facilities." All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Missile storage facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 8 of Section I defines a "launcher storage facility" as a facility at which launchers of intermediate-range or shorter-range missiles are stored. The definition excludes any such facility located at a missile operating base. Pursuant to paragraph 9 of Article II of the Treaty, launcher storage facilities are considered to be "missile support facilities." All missile support facilities must be eliminated pursuant to paragraph 8 of of Article X. Launcher storage facilities are subject to "baseline," "close-out," and "short-notice" inspections pursuant to paragraphs 3, 4, and 5, respectively, of Article XI.

Paragraph 9 of Section I defines an "elimination facility" as a facility at which intermediate-range or shorter-range missiles, missile stages and launchers of such missiles, or support equipment associated with such missiles of launchers are eliminated. Pursuant to paragraph 9 of Article II of the Teaty, elimination facilities are considered to be "missile support facilities." Moreover, pursuant to paragraph 5 of Article VIII of the Treaty, a Party may increase the number of, or change the location of, its elimination facilities. This is allowed to assist the Parties in the elimination of items within Treaty time frames. Notice of any such change must be given 30 days in advance, pursuant to subparagraph 5(b) of Article IX of the Treaty. All missile support facilities must be eliminated pursuant to paragraph 8 of Article X. Elimination facilities are subject to "baseline" and "close-out" inspections pursuant to paragraphs 3 and 4, respectively, or Article XI. Also, former elimination facilities are subject to "short-notice" inspections pursuant to subparagraph 5(b) of Article XI.

Paragraph 10 of Section I defines "support equipment" as unique vehicles and mobile or transportable equipment used to support a deployed intermediate-range or shorter-range missile or a launcher of such a missile. Full-scale inert training missiles, full-scale inert training missile stages, full-scale inert training launcher canisters, and training launchers not capable to launching a missile are also included in this definition. Paragraph 10 notes that a listing of such support equipment associated with each existing type of missile, and launcher thereof, except for training equipment, is contained in Section VI of the MOU. Pursuant to paragraph 1 of Article IV and paragraph 1 of Article V of the Treaty, support equipment must be eliminated during the same period as is set for the elimination of intermediate-range and shorter-range missiles, respectively. Pursuant to paragraph 1 of Article X, such equipment must be eliminated in accordance with procedures established by the Protocol on Elimination.

Paragraph 11 of Section I defines "support structure" as a unique fixed structure used to support deployed intermediate-range missiles or launchers of such missiles. As in paragraph 10, this paragraph notes that a listing of such support structures is contained in Section VI of the MOU. Pursuant to paragraph 1 of Article IV of the Treaty, support structures must be eliminated during the same period as is set for the elimination of intermediate-range missiles, which is three years after the entry into force of the Treaty. Pursuant to paragraph 1 of Article X of the Treaty, such structures must be eliminated in accordance with procedures established by the Protocol on Elimination.

Paragraph 12 of Section I defines a "research and development lanuch site" as a facility at which research and development booster systems are launched. Such booster systems are permitted by paragraph 12 of Article VII of the Treaty. Research and development launch sites are listed in Section VII of the MOU.

SECTION II—TOTAL NUMBERS OF INTERMEDIATE-RANGE AND SHORTER-RANGE MISSILES AND LAUNCHERS OF SUCH MISSILES

Section II lists, for each Party, the total number of intermediate-range and shorter-range missiles, and the launchers of such missiles, that are subject to the Treaty. These data are required to be listed in the MOU pursuant to paragraph 1 of Article IX. Paragraph 1 of Section II lists the numbers of intermediate-range missiles and launchers, while paragraph 2 lists the numbers of shorter-range missiles and launchers. Each paragraph contains the following categories: deployed missiles, non-depolyed missiles, aggregate number of deployed and non-deployed missiles, aggregate number of second stages of missiles, deployed launchers, non-deployed launchers, and aggregate number of deployed and non-deployed launchers.

SECTION III—INTERMEDIATE-RANGE MISSILES, LAUNCHERS OF SUCH MISSILES AND SUPPORT STRUCTURES AND SUPPORT EQUIPMENT ASSOCIATED WITH SUCH MISSILES AND LAUNCHERS

Section III provides the locations of the intermediate-range missiles, launchers, support equipment, and support structures that the Treaty requires to be destroyed. Because such items are required, unless in transit, to be located in deployment areas, at missile operating bases, or at missile support facilities, the data are organized by such areas, bases, and facilities. Not only have the Parties specified the precise geographical coordinates of such areas, bases, and facilities, but site diagrams of all missile operating bases and agreed missile support facilities have been appended to the MOU. Also, any missiles, launchers, or support equipment in transit are listed to the MOU. Section III is, therefore, an example of the unprecedented scope of the data exchange required by the Treaty regime.

Paragraph 1 of Section III contains the numbers and locations, for each Party, of deployed intermediate-range missiles listed as existing types in Article III of the Treaty, launchers of such missiles, and the support equipment and support structures associated with such missiles and launchers. The data in paragraph 1 and listed by the deployment areas and missile operating bases at which such items are located. A site diagram, including boundaries and center coordinates, of each listed missile operating base is appended to the MOU. The boundaries of deployment areas are indicated in the text of paragraph 1 by geographic coordinates, connected by straight lines or linear landmarks, including national boundaries, rivers, railroads, or highways.

The deployed intermediate-range missiles listed under paragraph 1 include, for the United States, the Pershing II GLBM and the BGM-109G GLCM, and, for the Soviet Union, the SS-20 GLBM and the SS-4 GLBM. In addition to the numbers and locations of deployed missiles and their bases, paragraph 1 contains information concerning: (a) the number of launch pad shelters, training stages, and operational spares for U.S. Pershing II GLBMS; (b) the number of operational spares, training missiles, and training launch canisters for U.S. BGM-109G GLCMs; (c) the number of launch canisters, missile transporter vehicles, training missiles, and fixed structures for launchers of Soviet SS–20 GLBMs; and (d) the number of missile transporter vehicles, missile erectors, propellant tanks, and training missiles for Soviet SS–4 GLBMs.

Paragraph 2 of Section III provides information on all non-deployed intermediate-range missiles listed as existing types in Article III of the Treaty. The information includes the number of such non-deployed intermediate-range missiles, the number of launchers of such missiles, and the number and types of support structures and support equipment associated with such missiles and launchers. This information is listed for each missile support facility at which such non-deployed intermediate-range missiles and their associated equipment are located. The location of each missile support facility is also provided. A site diagram, including boundaries and center coordinates, of each agreed missile support facility is appended to the MOU.

The non-deployed intermediate-range missiles listed under paragraph 2 include, for the United States, the Pershing II GLBM and the BGM–109G GLCM, and, for the Soviet Union, the SS–20 GLBM, the SS–4 GLBM, and the SS–5 GLBM. The types of missile support facilities listed include missile production facilities, launcher production facilities, missile storage facilities, launcher storage facilities, missile repair facilities, launcher repair facilities, test ranges, training facilities, and elimination facilities. The types of missile support equipment and structures listed in paragraph 2 are specified for each Party. They include, as appropriate for each type of missile system, missile transporter vehicles, missile erectors, propellant tanks, training missiles, launch canisters, fixed structures for launchers, training launch canisters, launch pad shelters, and training missile stages. Paragraph 2 also lists any missiles, launchers, or support equipment in transit.

Paragraph 3 of Section III lists, for each Party, vehicles used to train drivers of launchers of intermediate-range missiles, and stipulates that such vehicles must be considered to be training launchers for purposes of the Treaty. The number of such vehicles is 29 for the United States and 65 for the Soviet Union. The paragraph requires that such vehicles must be eliminated in accordance with the procedures in paragraph 3 of Section IV of the Protocol on Elimination.

SECTION IV—SHORTER-RANGE MISSILES, LAUNCHERS OF SUCH MISSILES AND SUPPORT EQUIPMENT ASSOCIATED WITH SUCH MISSILES AND LAUNCHERS

Section IV parallels Section III by providing comparable information with respect to deployed and non-deployed shorter-range missiles, launchers, and associated support equipment.

Paragraph 1 of Section IV provides the numbers, for each Party, of deployed shorter-range missiles listed as existing types in Article III of the Treaty, of launchers of such missiles, and of the support equipment associated with such missiles and launchers. This information is listed by the missile operating base at which such items are located. The location of such missile operating bases is also provided. A site diagram, including boundaries and center coordinates, of each listed missile operating base is appended to the MOU. Since the United States has no deployed shorter-range missile systems, only information pertaining to Soviet missile systems, i.e., the SS–12 and SS–23, is included in paragraph 1. Support equipment listed for the SS–12 and SS–23 includes missile transporter vehicles and training missiles.

Paragraph 2 of Section IV provides information on all non-deployed shorter-range missiles listed as existing types in Article III of the Treaty. The information includes the number of such non-deployed shorter-range missiles, the number of launchers of such missiles, and the number and types of support equipment associated with such missiles and launchers. This information is listed for each missile support facility at which such non-deployed shorter-range missiles and their associated equipment are located. The location of each missile support facility is also provided. A site diagram, including boundaries and center coordinates, for each agreed missile support facility is appended to the MOU.

The non-deployed shorter-range missiles listed under paragraph 2 of Section IV include, for the United States, the Pershing IA GLBM, and, the Soviet Union, the SS–12 GLBM and SS–23 GLBM. The types of missile support facilities listed include missile production facilities, launcher production facilities, missile storage facilities, launcher storage facilities, missile repair facilities, launcher repair facilities, test ranges, training facilities, and elimination facilities. The kinds of support equipment listed under paragraph 2 include training missile stages, missile transporter vehicles, and training missiles. Paragraph 2 also lists missiles, launchers, or support equipment in transit.

SECTION V—MISSILE SYSTEMS TESTED BUT NEVER DEPLOYED

Section V provides information on all intermediate-range and shorter-range missiles that have been tested prior to the entry into force of the Treaty but never deployed and that are not existing types of intermediate-range or shorter-range missiles listed in Article III of the Treaty. The information includes the numbers of all such missiles and of all launchers of such missiles. This information is listed by the missile support facility at which such items are located. The location of each missile support facility is also provided. A site diagram, including boundaries and center coordiantes, of each agreed missile support facility is appended to the MOU. Pursuant to paragraph 6 of Article X, these missles, together with their launchers, must be eliminated within six months after entry into force of the Treaty.

Such missile systems listed under Section V include, for the United States, the Pershing IB shorter-range GLBM, and, for the Soviet Union, the SSC–X–4 intermediate-range GLCM. The types of missile support facilities listed include missile production facilities, launcher production facilities, missile storage facilities, launcher storage facilities, missile repair facilities, launcher repair facilities, test ranges, training facilities, and elimination facilities. Section V also lists missiles, launchers, or support equipment in transit.

SECTION VI—TECHNICAL DATA

Section VI provides the technical data for intermediate-range and shorter-range missiles, for their launchers, and for their associated support structures and support equipment. Photographs of missiles, launchers, support structures, and support equipment listed in this Section are appended to the MOU.

Paragraph 1 of Section VI provides the relevant data for intermediate-range missile systems. Such missiles include the U.S. Pershing II GLBM, the U.S. BGM-109G GLCM, the Soviet SS-20 GLBM, the Soviet SS-4 GLBM, the Soviet SS-5 GLBM, and the Soviet SSC-X-4 GLCM. Missile characteristics, launcher characteristics, and the characteristics of associated support structures and support equipment are provided for each missile system. The characteristics listed for each missile include: (a) the maximum number of warheads per missile, (b) the length of the missile, (c) the length of the first and second stages of the missile, (d) the maximum diameter of the first and second stages of the missile, and (e) the weight of the missile and its stages. The characteristics listed for each launcher include: (a) its dimensions, (b) the maximum number of missiles it can carry or contain, and (c) its weight. The characteristics listed for associated support structures include: (a) the dimension of fixed structures for a launcher, and (b) the dimensions of the launch pad shelter. The characteristics listed for support equipment include the dimensions of the: (a) launch canister, (b) missile transporter vehicles, (c) missile erector, and (d) propellant tank.

Paragraph 2 of Section VI provides the relevant data for shorter-range missile systems. Such missiles include the U.S. Pershing IA GLBM, the U.S. Pershing IB GLBM, the Soviet SS-12 GLBM, and the Soviet SS-23 GLBM. Missile characteristics, launcher characteristics, and the characteristics of associated support equipment are provided for each missile system. The characteristics listed for each missile include: (a) the maximum number of warheads per missile, (b) the length of the missile, (c) the length of the first and second stages of the missile, (d) the maximum diameter of the first and second stages of the missile, and (e) the weight of the missile and its stages. The characteristics listed for each launcher include: (a) its dimensions, (b) the maximum number of missiles it can carry or contain, and (c) its weight. The characteristics listed for support equipment include the dimensions of the missile transporter vehicle.

SECTION VII—RESEARCH AND DEVELOPMENT BOOSTER SYSTEMS

Section VII provides the number and location, for each Party, of launchers of research and development booster systems. Such booster systems are permitted by paragraph 12 of Article VII of the Treaty.

FINAL PROVISIONS

In the first paragraph of the Final Provisions, each Party acknowledges that, in signing the MOU, it is responsible for the accuracy of only its own data and that signing of the MOU constitutes acceptance of the categories of data and inclusion of the data contained in them.

The second paragraph affirms that the MOU is an integral part of the Treaty and that it will enter into force on the date of entry into force of the Treaty and remain in force so long as the Treaty remains in force.

The third paragraph records that the MOU was done at Washington on December 8, 1987, in two copies, each in the English and Russian languages, both texts being equally authentic.

Article-by-Article Analysis of the Protocol on Procedures Governing the Elimination of the Missile Systems Subject to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles

STRUCTURE AND OVERVIEW OF THE PROTOCOL

The Protocol on Elimination (the Protocol) consists of a Preamble and five Sections.

The Protocol sets forth the detailed procedures for the elimination of items subject to the Treaty as required by Articles IV, V, and X of the Treaty. The Protocol is notable in that, unlike past arms control agreements, it specifies procedures for eliminating each type of missile system item-by-item (e.g., the SS–20 GLBM), rather than establishing a single elimination procedure for an entire class of items subject to elimination (e.g., GLBMs). For example, in the case of the class of intermediate-range GLBMs, specific and separate elimination procedures are provided for the Pershing II, SS–20, SS–4, and SS–5 missile systems. Furthermore, in the case of the Soviet SS–20 intermediate-range GLBM, for instance, specific and separate procedures are set forth for elimination of the SS–20 missile, its launch canister, its launcher, its missile transporter vehicle, and the fixed structure for its launcher. Each item is required to be eliminated in a specified manner that will help to ensure that it can never again serve the purposes for which it was originally intended.

PREAMBLE

In the Preamble, the Parties state that, pursuant to and in implementation of the Treaty, they have agreed upon procedures governing the elimination of the missile systems subject to the Treaty.

SECTION I—ITEMS OF MISSILE SYSTEMS SUBJECT TO ELIMINATION

Section I lists the specific items for each type of missile system that must be eliminated.

For the United States, the specific items for each missile system to be eliminated are: for the Pershing II intermediate-range GLBM: missile, launcher, and launch pad shelter; for the BGM-109G intermediate-range GLCM: missile, launch canister, and launcher; for the Pershing IA shorter-range GLBM: missile and launcher; and, for the Pershing IB shorter-range GLBM: missile.

For the Soviet Union, the specific items of each missile system to be eliminated are: for the SS–20 intermediate-range GLBM: missile, launch canister, launcer, missile transporter vehicle, and fixed structure for a launcher; for the SS–5 intermediate-range GLBM:

missile, missile transporter vehicle, missile erector, launch stand, and propellant tanks; for the SS–5 intermediate-range GLBM: missile; for the SSC–X–4 intermediate-range GLCM: missile, launch canister, and launcher; for the SS–12 shorter-range GLBM: missile, launcher, and missile transporter vehicle; and, for the SS–23 shorter-range GLBM: missile, launcher, and missile transporter vehicle.

Also, for both Parties, all training missiles, training missile stages, training launch, canisters, and training launchers, as well as all stages of intermediate-range and shorter-range GLBMs and all front sections of deployed intermediate-range and shorter-range missiles, must be eliminated.

SECTION II—PROCEDURES FOR ELIMINATION AT ELIMINATION FACILITIES

This Section, which forms the bulk of the Protocol, establishes the detailed procedures to be followed in eliminating systems at elimination facilities. Subsequent Sections provide for elimination at other locations.

Paragraph 1 of Section II introduces the next several paragraphs of this Section, which establish procedures that the Parties must fulfill in order to ensure reliable determination of the type and number of items being eliminated and to preclude the possibility that such items could be restored for purposes that would violate the Treaty. These items, which are listed in Section I, include missiles, missile stages, front sections of missiles, launch canisters, launchers, missile transporter vehicles, missile erectors, and launch stands, as well as training missiles, training missile stages, training launch canisters, and training launchers.

Paragraph 2 of Section II provides for on-site inspection of the conduct of the elimination procedures for the items listed in paragraph 1 of this Section, except for training missiles, training missile stages, training launch canisters and training launchers. Such on-site inspections must be conducted in accordance with Article XI of the Treaty and the Protocol on Inspection. With respect to the excepted items related to training, the Parties may conduct on-site inspections to confirm the completion of the elimination procedures described in paragraph 11 of Section II. Not less than 30 days in advance of such an inspection, the Party possessing the training items must provide the other Party with the name and geographic coordinates of the elimination facility at which such an on-site inspection may be conducted and the date on which the inspection may take place.

Paragraph 3 of Section II states that before a missile arrives at the elimination facility, its nuclear warhead device and guidance elements may be removed. Nuclear warhead devices and guidance elements are not required to be eliminated because destroying them would be meaningless unless the manufacture of new such items was also prohibited. Also, since warheads are small, verifying compliance with such a prohibition would be extremely difficult. Furthermore, the retention of the fissionable material from the warheads conserves resources necessary to U.S. national security.

Paragraph 4 of Section II gives each Party the right to select the technological means to implement the elimination procedures required in paragraphs 10 and 11 of this Section, and to allow for on-site inspection of those elimination procedures in accordance with Article XI of the Treaty, this Protocol, and the Protocol on Inspection.

Paragraph 5 of Section II provides that the commencement of the procedures set forth in paragraph 10 or 11 of this Section will signal the initiation of the elimination of the items of the missile systems.

Paragraph 6 of Section II provides that immediately before the initiation of the elimination procedures set forth in paragraph 10 of this Section, an inspector, from the Party receiving a notification required by subparagraph 5(c) of Article IX of the Treaty concerning scheduled eliminations, must confirm and record the numbers and the types of missile systems that are to be eliminated. This can include a visual inspection of the contents of launch canisters, if the Inspecting Party deems it necessary.

Paragraph 7 of Section II requires that a missile stage that is being eliminated by burning in accordance with the procedures set forth in paragraph 10 of this Section must not have instruments for data collection. An inspector must confirm this lack of instrumentation through an inspection before the elimination procedures are set in motion. Continuous observation by the inspector of such missile stages is required until the burning is completed.

Paragraph 8 of Section II requires that the completion of elimination procedures must be confirmed in writing by both the representative of the Party carrying out the elimination and the inspection team leader of the other Party. Such a report must include the number and type of items of missile systems for which the procedures have been completed. However, in the case of training missiles, training missile stages, training launch canisters, and training launchers, paragraph 8 stipulates that elimination will be considered completed upon completion of the procedures set forth in paragraph 11 of this Section and upon notification as required by subparagraph 5(e) of Article IX of the Treaty; thus, no report is required after the elimination of such training equipment.

Paragraph 9 of Section II records the agreement of the Parties that all U.S. and Soviet intermediate-range and shorter-range missiles, along with their associated reentry vehicles, must be eliminated not later than 15 days before the end of the overall period of elimination for all such missiles. As specified in Articles IV and V of the Treaty, all such missiles shall be eliminated by the end of three years after entry into force of the Treaty.

Paragraph 9 also requires that, during the last 15 days of the overall (i.e., three-year) elimination period, a Party must withdraw to its national territory reentry vehicles that, by unilateral decision, have been released from existing programs of cooperation, and eliminate them during the same time frame.

On August 26, 1987, the Federal Republic of Germany announced that it would dismantle its Pershing IA missiles when the United States and the Soviet Union had eliminated all of their intermediate-range and shorter-range missiles pursuant to the Treaty. This unilateral decision by the Federal Republic is completely separate from the Treaty. This decision represents a policy of the Federal Republic of Germany that is not legally binding upon the Parties to the Treaty. Following the Federal Republic's unilateral decision, the United States and the Soviet Union agreed that they will eliminate their intermediate-range missiles by 15 days prior to the end of the three-year elimination period specified by the Treaty. At that point, the conditions established by the Federal Republic will have been met, and the existing program of cooperation will have therefore ceased. The U.S. reentry vehicles now associated with the Federal Republic's Pershing IA missiles will then be withdrawn and returned to U.S. territory. The United States will eliminate them in accordance with the Protocol on Elimination. The Treaty and its associated documents will not affect existing programs of cooperation. The important U.S. principle, that systems belonging to third countries will not be subject to bilateral arms control agreements between the United States and the Soviet Union, has thus been preserved.

Paragraph 10 of Section II sets forth the specific procedures that must be used to eliminate the items of missile systems listed in Paragraph 1 of this Section, unless the Parties agree upon different procedures to achieve the same result. This paragraph addresses all items of missile systems except those related to training, which are addressed in paragraph 11 of this Section. The elimination procedures for specific missile systems set forth in paragraph 10 are as follows:

For the U.S. Pershing II GLBM, the elimination procedures provide for destruction of missile stages by demolition or burning. Solid fuel, rocket nozzles, and motor cases not already destroyed in that process must be eliminated by burning, crushing, flattering, or destruction by explosion. Destruction by burning includes static firing of a missile stage, which results in the burning of the fuel, followed by crushing or flattening of the remainder of the stage; this is the method most frequently used in the past by the United States to destroy missiles. The front section of the missile, without the nuclear warhead device and guidance elements, must be crushed or flattened. The procedures for elimination of the Pershing II launchers include the removal of the erector-launcher mechanism from the launcher chassis; cutting all components of erector-launcher mechanisms, at places that are not assembly joints, into two pieces of approximately equal size; removal of missile launch support equipment from the launcher chassis; and cutting the launcher chassis, at a place that is not an assembly joint, into two pieces of approximately equal size. The procedures require the cutting of certain items at places that are not assembly joints in order to make it substantially more difficult to reassemble them.

For the U.S. BGM-109G GLCM, the elimination procedures require that the missile airframe be cut longitudinally into two pieces and that the wings and tail section be severed from the airframe at locations other than assembly joints. The front section of the airframe must be crushed or flattened after removal of the nuclear warhead device and guidance elements. The BGM-109G launch canister must also be destroyed, by crushing, flattening, cutting into two pieces of approximately equal size, or explosion. Elimination procedures for the BGM-109G launcher parallel those for the Pershing II launcher described above.

The elimination procedures for the U.S. Pershing IA missile and launcher are identical to those for the Pershing II missile and launcher described above.

The elimination procedures for the U.S. Pershing IB missile are identical to those for the Pershing II missile described above.

For the Soviet SS-20 missile, the elimination procedures are similar to those described above for the U.S. Pershing II missile, with the exception that the front end of the missile, along with its reentry vehicles, must be crushed or flattened. The elimination procedures for the SS-20 launch canister require that it either be destroyed by explosive demolition along with the missile or be destroyed separately from the missile by explosion, cutting into two pieces of approximately equal size, crushing, or flattening. The elimination procedures for the SS-20 launcher do not require that the launcher chassis be cut into two approximately equal pieces (as the United States proposed for its Pershing II and GLCM launchers), but contain other procedures for rendering it inoperable as a launcher. Finally, the elimination procedures for the SS-20 missile transporter vehicle require that: (a) all mechanisms associated with missile loading and mounting be removed; (b) all mounting of such mechanisms be cut off the missile transporter vehicle chassis; (c) all components of the mechanisms associated with missile loading and mounting be cut into equal pieces at places that are not assembly joints; (d) external instrumentation compartments be removed from the transporter vehicle chassis; (e) transporter vehicle leveling support be cut off the transporter vehicle chassis and be cut, at locations that are not assembly joints, into two pieces of approximately equal size; and (f) a portion of the SS-20 transporter vehicle chassis at least 0.78 meters in length must be cut off from behind its rear axle.

For the Soviet SS-4 missile, the elimination procedures provide for cutting off propulsion system nozzles; cutting propellant tanks into two pieces of about the same size; cutting instrumentation compartments (after the guidance elements have been removed) into two pieces of about the same size; and destroying the front section of the missile, without the warhead device, by crushing or flattening. The elimination procedures require that the SS-4 launch stand components be cut, at locations that are not assembly joints, into two pieces of approximately equal size. Regarding the SS-4 missile erector, the elimination procedures require that the missile erector jib and missile erector leveling supports be cut into two approximately equal pieces and that they, along with the missile erector mechanism, also be cut off of the missile erector at locations that are not assembly joints. Regarding the SS-4 missile transporter vehicle, the procedures require that the mounting components for a missile and a missile erector mechanism, as well as the supports for erecting a missile onto a launcher, be cut off from the missile transporter vehicle at locations that are not assembly joints.

For the Soviet SS-5 missile, the elimination procedures are similar to those described above for the SS-4 missile, except that the front end of the SS-5 missile is not required to be crushed or flattened.

For the Soviet SSC-X-4 GLCM missile, launch canister, and launcher, the elimination procedures are the same as for the U.S. BGM-109G GLCM, except that the SSC-X-4 launcher chassis must be severed at a point no more than 0.70 meters behind the rear axle, mountings of the erector-launcher mechanism and launcher leveling supports must be cut off the launcher chassis, and launcher leveling supports must be cut into two pieces of approximately equal size at locations that are not assembly joints.

For the Soviet SS-12 and SS-23 missiles, launchers, and missile transporter vehicles, the elimination procedures parallel those for the SS-20, except that the front sections of the SS-12 and SS-23 missiles do not include reentry vehicles, and destruction of their front sections may be done by explosive demolition together with the missile. Also, for the SS-23, the control equipment of the mechanism associated with missile loading must be removed from the transporter vehicle.

Paragraph 11 of Section II provides specific procedures for the elimination of the training missiles, training missile stages, training launch canisters, and training launchers listed in Section I. All of these items, except for training launchers, must be eliminated by crushing, flattening, cutting into two pieces of about equal size, or destroying by explosion. The procedures require training launchers to be eliminated by cutting the chassis of the training launcher at the same location specified in paragraph 10 above for the launcher of the same type of missile.

SECTION III—ELIMINATION OF MISSILES BY LAUNCHING

Section III sets forth the procedures by which intermediate-range missiles may be eliminated by means of launching them in order to destroy them. In this regard, paragraph 5 of Article X of the Treaty gives each Party the right to eliminate up to 100 of its intermediate-range missiles in this manner during the first six months after entry into force of the Treaty. Note, however, that subparagraph 1(a) of Article VI of the Treaty prohibits the flight-testing of intermediate-range missiles. The purpose of Section III is to provide procedures that permit elimination by launching, while ensuring that such elimination will not be used effectively as a flight-test, which would provide the launching Party with militarily useful data. Shorter-range missiles may not be eliminated by launching.

Paragraph 1 of Section III provides that the elimination of intermediate-range missiles by means of launching is subject to on-site inspection in accordance with paragraph 7 of Article XI of the Treaty (which provides for "elimination" inspections) and Section VIII of the Protocol on Inspection. Paragraph 1 requires that, immediately prior to each launch conducted for the purpose of elimination, an inspector from the Inspecting Party will confirm by visual observation the type of missile to be launched.

Paragraph 2 of Section III requires that all missiles being eliminated by launching be launched from designated elimination facilities to existing impact areas for such missiles. No such missile may be used as a target for ballistic missile interceptors.

Paragraph 3 of Section III provides that missiles being eliminated by launching must be launched one at a time with at least six hours between each launch.

Paragraph 4 of Section III requires that launches must involve ignition of all missile stages. Also, neither Party is permitted to transmit or recover data from missiles being eliminated by launching, except for unencrypted data used for range safety purposes.

Paragraph 5 of Section III provides that the completion of the elimination procedures set forth in this Section, and the type and number of missiles for which those procedures have been completed, must be confirmed in writing by the representative of the launching Party and by the inspection team leader of the Inspecting Party.

Paragraph 6 of Section III Provides that a missile is considered eliminated by launching: (1) after completion of the procedures set forth in this Section and (2) upon notification required by subparagraph 5(e) of Article IX of the Treaty.

SECTION IV—PROCEDURES FOR ELIMINATION IN SITU

Certain of the items that must be eliminated pursuant to the Treaty are structures that cannot be moved to elimination facilities, or training items that are not required to be moved to elimination facilities. Accordingly, Section IV provides procedures for the elimination, *in situ,* of support structures, propellant tanks of Soviet SS-4 missiles, and certain training items.

Paragraph 1 of Section IV provides the procedures for the elimination of support structures. Support structures are associated only with intermediate-range missile systems; shorter-range missile systems do not possess such structures. Subparagraph 8(a) of Article II provides that support structures are located at missile operating bases of intermediate-range missiles.

Subparagraph 1(a) of Section IV states that the support structures listed in Section I of this Protocol must be eliminated *in situ,* i.e., at the sites at which they are presently located.

Subparagraph 1(b) provides that the initiation of the elimination of support structures will be considered to be the commencement of the elimination procedures specified in subparagraph 1(d) below.

Subparagraph 1(c) provides that the elimination of support structures is subject to verification by on-site inspection in accordance with paragraph 4 of Article XI Of the Treaty. Paragraph 4 of Article XI provides for "close-out" inspections at missile operating bases in order to confirm that the elimination has, in fact, occurred. The procedures for "close-out" inspections are set forth in Section VII of the Protocol on Inspection.

Subparagraph 1(d) specifies the elimination procedures for support structures. The procedures are as follows:

—the superstructure of the fixed structure or shelter must be dismantled or demolished, and removed from its base or foundation;

—the base or foundation of the fixed structure or shelter must be destroyed by excavation or by explosion; and

—the destroyed base or foundation of a fixed structure or shelter must remain visible to national technical means of verification for six months or until completion of an on-site inspection conducted in accordance with Article XI of the Treaty.

Upon completion of the above requirements, the elimination procedures will be considered to have been completed.

Paragraph 2 of Section IV requires that the fixed and the transportable propellant tanks of the Soviet SS–4 itnermediate-range GLBM be removed from launch sites.

Paragraph 3 of Section IV specifies the procedures for the elimination, *in situ*, of training missiles, training missile stages, training launch canisters, and training launchers.

Subparagraph 3(a) requires that such training equipment that was not eliminated at elimination facilities must be eliminated *in situ*.

Subparagraph 3(b) requires that such training equipment being eliminated *in situ* must be eliminated in accordance with the specific procedures set forth in paragraph 11 of Section II of the Protocol.

Subparagraph 3(c) provides each Party with the right to conduct an on-site inspection to confirm the completion of the elimination procedures.

Subparagraph 3(d) requires that a Party possessing such training equipment must inform the other Party of the place-name, and coordinates of the location at which the on-site inspection provided for in subparagraph 3(c) above may be conducted as well as the date on which it may be conducted. Such information must be provided no less than 30 days in advance of the date of the scheduled on-site inspection.

Subparagraph 3(e) provides that elimination of such training equipment will be considered accomplished upon completion of the procedures required by this paragraph and upon notification as required by subparagraph 5(e) of Article IX of the Treaty following the date specified pursuant to subparagraph 3(d) above.

SECTION V—OTHER TYPES OF ELIMINATION

Section V provides for elimination due to loss or accidental destruction, and for elimination by placing items on static display.

Paragraph 1 of Section V provides procedures in the case of elimination resulting from loss or accidental destruction of an item listed in Section I of the Protocol. Notice of such elimination must be given by the possessing Party within 48 hours as required by subparagraph 5(e) of Article IX of the Treaty. Such notice must include a statement of the relevant circumstances surrounding the loss or accident, including its approximate or assumed location and the name or type of item that was eliminated by such loss or accidental destruction. In order to provide confidence that the elimination actually occurred, the other Party has a right to conduct an inspection at the specific site of the accident.

Paragraph 2 of Section V provides the Parties with the right to eliminate certain items that are listed in Section I of the Protocol by placing them on static display. The items that may be eliminated by this procedure are missiles, launch canisters, launchers, training missiles, training launch canisters, and training launchers. Each Party may eliminate a total of 15 missiles, 15 launch canisters, and 15 launchers by placing them on static display. The totals for each of the three categories include both operational and training items. The procedures require that, before being placed on static display, the items be rendered unusable for any purpose inconsistent with the Treaty. Missile propellant must be removed, and erector-launcher mechanisms must be made inoperative. For purposes of verification, the other Party has the right to conduct an on-site inspection of the item or items to be placed on static display within 60 days of receipt of notification by the possessing Party. Such notification is required by paragraph 2, and this notification must include: (a) the place-name and coordinates of the location at which the missile, launch canister, or launcher is to be on static display, and (b) the location at which the on-site inspection may take place. After all of the above procedures have been completed and notification has been given as required by subparagraph 5(e) of Article IX of the Treaty, elimination of a missile, launcher, launch canister, training missile, training launch canister, or training launcher by placing it on static display will be deemed to be completed.

FINAL PROVISIONS

The penultimate paragraph of the Protocol specifies that the Protocol is an integral part of the Treaty, that it will enter into force on the date of entry into force of the Treaty and that it will remain in force as long as the Treaty remains in force. The paragraph also provides that the Parties may agree upon measures to improve the viability and effectiveness of the Protocol, through the Special Verification Commission established pursuant to Article XIII of the Treaty. Such measures will not be deemed to be amendments to the Treaty. Thus, while substantive obligations cannot be changed absent an agreed amendment to the Treaty, minor matters relating to the detailed elimination procedures may be altered through agreement of the Parties in order to facilitate the implementation of the Treaty regime.

The final paragraph records that the Protocol was done at Washington on December 8, 1987, in two copies, each in the English and Russian languages, both texts being equally authentic.

Article-by-Article Analysis of the Protocol Regarding Inspections Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles

STRUCTURE AND OVERVIEW OF THE PROTOCOL

The Protocol on Inspection (the Protocol) consists of a Preamble, 11 Sections, and an Annex on privileges and immunities of inspectors and aircrew members.

The Protocol provides the detailed procedures to implement the Treaty's on-site inspection regime, as required by Article XI of the Treaty. These on-site inspection procedures, unprecedented in scope and detail, will work with our national technical means of verification and with the data exchanges required by Article IX of the

Treaty to help provide effective verification of Soviet compliance with the Treaty limitations.

PREAMBLE

The Preamble states that, pursuant to and in implementation of the Treaty, the Parties have agreed upon procedures governing the conduct of inspections provided for in Article XI of the Treaty.

SECTION I—DEFINITIONS

Section I sets forth the definitions of certain terms used in the Protocol, the Treaty, the MOU, and the Protocol on Elimination. Definitions are provided for the following terms: (1) Inspected Party, (2) Inspecting Party, (3) inspector, (4) inspection team, (5) inspection site, (6) period of inspection, (7) point of entry, (8) in-country period, (9) in-country escort, and (10) aircrew member.

Paragraph 1 of Section I defines the "Inspected Party" as the Party to the Treaty whose sites are subject to inspection pursuant to Article XI of the Treaty. Note that this refers to a "Party," meaning either the United States or the Soviet Union. When an inspection takes place on the territory of a Basing Country, as defined in paragraph 15 of Article II of the Treaty, either the United States or the Soviet Union, as appropriate, will be the "Inspected Party."

Paragraph 2 of Section I defines the "Inspecting Party" as the Party carrying out the inspection. As in the case of paragraph 1, the "Inspecting Party" will be either the United States or the Soviet Union.

Paragraph 3 of Section I defines an "inspector" as an individual who is designated by a Party to carry out inspections and who is included on the Party's list of inspectors, prepared in accordance with the provisions of Section III of the Protocol. Section III sets forth the detailed procedures for designation and acceptance of inspectors. Inspectors are granted privileges and immunities pursuant to the Annex to the Protocol.

Paragraph 4 of Section I defines an "inspection team" as a group of inspectors assigned to carry out a particular inspection. Each person on an "inspection team" is an "inspector." Paragraph 15 of Section VI establishes the number of inspectors per team.

Paragraph 5 of Section I defines an "inspection site" as the area, location, or facility at which an inspection takes place. Site diagrams of missile operating bases and agreed missile support facilities are appended to the MOU.

Paragraph 6 of Section I defines an "period of inspection" as the time from the arrival of the team at the site until its departure from the inspection site, exclusive of any pre-inspection and post-inspection procedures. Paragraph 14 of Section VI establishes the time limits for certain types of inspections as well as for pre-inspection and post-inspection procedures.

Paragraph 7 of Section I designates the "points of entry": for the United States as Washington, D.C. or San Francisco, California; for the Union of Soviet Socialist Republics as Moscow or Irkutsk; for the Kingdom of Belgium as Brussels (National Airport); for the Federal Republic of Germany as Frankfurt (Rhein Main Airbase);

for the Republic of Italy as Rome (Ciampino); for the Kingdom of the Netherlands as Schiphol; for the United Kingdom of Great Britain and Northern Ireland as RAF Greenham Common; for the German Democratic Republic as Schkeuditz Airport; and for the Czechoslovak Socialist Republic as International Airport Ruzyne. Paragraph 5 of Section IV establishes procedures to be followed if these points of entry are to be changed.

Paragraph 8 of Section I defines "in-country period" as the period of time that the inspection team is in the country from the arrival at the point of entry until departure from the country through the point of entry.

Paragraph 9 of Section I defines an "in-country escort" as individuals specified by the Inspected Party to accompany and assist inspection team and aircrew members throughout the in-country period. Paragraph I of Section V and paragraph 5 of Section VI provide detailed procedures concerning the in-country escort. When an inspection takes place in a Basing Country, that country will have the right to representation in the in-country escort.

Paragraph 10 of Section I defines an "aircrew member" as an individual who performs duties related to the operation of an airplane and who is included on a Party's list of aircrew members in accordance with the provisions of Section III of the Protocol. Aircrew members are granted privileges and immunities pursuant to the Annex to the Protocol.

SECTION II—GENERAL OBLIGATIONS

This section sets forth the basic obligation to facilitate inspections conducted pursuant to the Protocol on Inspection and the Treaty. It also notes that there are other agreements (e.g., the Basing Country Agreement between the United States and the five Allied Basing Countries) pertinent to the couduct of these inspections.

Paragraph 1 of Section II obliges each Party to help ensure verification of compliance with the obligations of the Treaty by facilitating inspections.

Paragraph 2 of Section II states that each Party takes note of the assurances received from the other party regarding understandings reached between the other Party and the Basing Countries to the effect that the Basing Countries have agreed to the conduct of inspections pursuant to the Protocol on their respective territories. The Basing Country agreement provides the legal basis for these assurances by the United States. The five Allied Basing Countries are the United Kingdom, Belgium, Italy, the Federal Republic of Germany, and the Netherlands. The German Democratic Republic and Czechoslovakia are the two Basing Countries in which Soviet missile systems subject to the Treaty are located.

SECTION III—PRE-INSPECTION REQUIREMENTS

This section sets forth the actions that must take place before inspections may be conducted. Inasmuch as these actions are required within specified periods of time, a Party would be in violation of the Treaty if the Party delayed an inspection by not completing pre-inspection requirements.

Paragraph 1 of Section III provides that inspections are to be carried out by inspectors designated in accordance with paragraphs 3 and 4 of Section III.

Paragraph 2 of Section III provides that, within one day after entry into force of the Treaty, each Party will provide the other Party with a list of aircrew members, a list of inspectors to carry out inspections pursuant to paragraphs 3, 4, 5, 7, and 8 of Article XI; and a list of proposed inspectors to carry out inspection activities by means of continuous portal monitoring activities pursuant to paragraph 6 of Article XI of the Treaty. No list may include more than 200 individuals.

Paragraph 3 of Section III requires each Party to review the other Party's lists of aircrew members and inspectors; inspectors must be citizens of the Party on whose list they appear. If an inspector proposed for conducting inspection activites by means of continuous portal monitoring pursuant to paragraph 6 of Article XI of the Treaty is unacceptable to a Party, that Party has 20 days from the time it receives the proposed list to object to the inclusion of that person on the list, in which case the individual must be deleted from the list. Each Party must inform the other Party of its agreement to the lists of aircrew members and inspectors conducting inspections pursuant to paragraphs 3, 4, 5, 7, and 8 of Article XI of the Treaty within 20 days of such receipt. While there is no initial right of refusal for aircrew members, or for inspectors conducting inspections pursuant to paragraphs 3, 4, 5, 7, and 8 of Article XI of the Treaty, paragraph 7 of Section III enables a Party to remove under certain conditions, an inspector or aircrew member from the other Party's list before that person ever engages in inspection activities.

Paragraph 4 of Section III provides that each Party has the right to amend its list of inspectors and aircrew members in the same manner as the initial designation. The other Party must respond to the amendments in the same manner as provided for with respect to initial designations in paragraph 3 of Section III.

Paragraph 5 of Section III provides that, within 30 days of receipt of the initial lists of inspectors and aircrew members, or of subsequent changes to such lists, the Party receiving such information must provide or ensure the provision of visas and other documents necessary to enable each inspector and aircrew member to enter and remain in the territory of the Party or Basing Country where an inspection site is located for the in-country period. Thus, the United States or the Soviet Union, as appropriate, will ensure that visas and other necessary documents will be provided for inspections in Basing Countries. Visas and documents will be valid for at least 24 months.

Paragraph 6 of Section III provides that inspectors and aircrew members will be accorded privileges and immunities in the country of the inspection site, throughout the in-country period, as set forth in the Annex on privileges and immunities. Thus, these privileges and immunities will apply to all inspections, including those in the Basing Countries.

Paragraph 7 of Section III provides that inspectors and aircrew members must respect the laws and regulations of the State on whose territory the inspection is carried out and must not interfere in the internal affairs of the State. It further provides that, if the Inspected Party determines that an inspector or aircrew member has violated the conditions governing inspection activities, has ever committed a criminal offense on the territory of the Inspected Party or a Basing Country, or has ever been expelled by an Inspected Party or a Basing Country, the Inspected Party making such a determination will notify the Inspecting Party, who must immediately delete the individual's name from the list of inspectors or aircrew members and at the same time remove that individual from the territory of the Inspected Party or Basing Country, if such individual is there at that time.

Paragraph 8 of Section III provides that each Party will, within 30 days of entry into force of the Treaty, inform the other Party of the standing diplomatic clearance number for the airplanes of the Party transporting inspectors and equipment into and out of the territory of the Party or Basing Country in which an inspection site is located. Aircraft routings are to be long established international airways agreed upon by the Parties.

SECTION IV—NOTIFICATIONS

Section IV contains detailed provisions concerning the notification that must be given prior to arrival at the inspection site and the specification of the type of inspection that the inspecting Party is planning to conduct.

Paragraph 1 of Section IV provides that notification of an intention to conduct an inspection will be made through the Nuclear Risk Reduction Centers and that receipt of such a notification will be acknowledged through those centers by the Inspected Party within one hour of its receipt. The Nuclear Risk Reduction Centers were established pursuant to the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Establishment of Nuclear Risk Reduction Centers, dated September 15, 1987. For an inspection conducted pursuant to paragraph 3, 4, or 5 of Article XI of the Treaty (i.e., a "baseline," "Close-out," or "short-notice" inspection, respectively), such notification will be made no less than 16 hours in advance of the estimated time of arrival of the inspection team at the point of entry, and shall include: the point of entry, date and estimated time of arrival at the point of entry; date and time when specification of the inspection site will be provided; and the names of inspectors and aircrew members. For an inspection conducted pursuant to paragraph 7 or 8 of Article XI of the Treaty (i.e., an "elimination" inspection), such notification will be made no less than 72 hours in advance of the estimated time of arrival of the inspection team at the point of entry and will include: the point of entry, date and estimated time of arrival at the point of entry; the site to be inspected and the type of inspection; and the names of inspectors and aircrew members.

Paragraph 2 of Section IV states that the date and time of the specification of the inspection site for "close-out" and "short-notice" inspections will be neither less than four hours nor more than 24 hours after the estimated date and time of arrival at the point of entry. In the case of the "baseline" inspections, the date and time of the specification of the inspection site shall be neither less than four nor more than 48 hours after the estimated date and time of arrival at the point of entry.

Paragraph 3 of Section IV provides for the transmittal by the Inspecting Party to the Inspected Party, through the Nuclear Risk Reduction Centers, of a flight plan from the last departure airfield outside the country in which the inspection site is located to the point of entry. The plan must be provided not less than six hours before scheduled departure from the last departure airfield, must contain specified information, and must be filed in accordance with International Civil Aviation Organization (ICAO) procedures applicable to civil aircraft.

Paragraph 4 of Section IV provides for approval of the flight plan described in paragraph 3 not less than three hours prior to the scheduled departure from the last airfield prior to entering the airspace of the country in which the inspection is to take place. This is necessary to ensure that the inspection team arrives on time at the point of entry.

Paragraph 5 of Section IV allows the Parties to change the points of entry set forth in Section II of the Protocol for the countries in which their deployment areas, missile operating bases, or missile support facilities are located by notifying the other Party. Such changes become effective five months after receipt of such notice.

SECTION V—ACTIVITIES BEGINNING UPON ARRIVAL AT THE POINT OF ENTRY

Section V contains detailed provisions regulating activities at the point of entry to facilitate the entry of inspectors and their equipment into the country where the inspection will take place.

Paragraph 1 of Section V provides that the in-country escort and a diplomatic aircrew escort will meet the inspection team and aircrew members at the point of entry on arrival. The number of aircrew members for each airplane may not exceed ten. The in-country escort will expedite the entry of the inspection team and aircrew members, as well as the entry of their baggage, equipment, and supplies, into the country in which the inspection is to take place. The diplomatic aircrew escort will have the right to accompany and assist aircrew members throughout the in-country period. In-country escorts in a Basing Country may include representatives of that Basing Country.

Paragraph 2 of Section V provides that an inspector will be considered to have begun his duties at the point of entry and to have ended his duties when he has left the territory of the Inspected Party or Basing Country. Pursuant to the Annex on privileges and immunities, the inspector's privileges and immunities apply during this entire period, and thereafter with respect to acts performed in the exercise of his official functions during that period.

Paragraph 3 of Section V requires each Party to ensure that the equipment and supplies necessary for inspection are exempt from all customs duties. However, such equipment will be subject to examination pursuant to paragraph 4 of Section V.

Paragraph 4 of Section V provides that the equipment and supplies the Inspecting Party brings into the country in which the inspection site is located are subject to examination at the point of entry each time they are brought in. This examination will be conducted by the in-country escort in the presence of the inspection team members before departure of the inspection team from the point of entry to the inspection site. It shall be for the purpose of ascertaining that any such equipment or supplies cannot perform functions unconnected with the inspection requirements of the Treaty. Equipment or supplies found unacceptable to the Inspected Party will be impounded at the point of entry until departure of the inspection team. Storage of the Inspecting Party's equipment and supplies at each point of entry will be within tamper-proof containers in a "dual-key" secure facility.

Paragraph 5 of Section V requires the Inspected Party to furnish inspection teams and aircrews with meals, lodging, work space, transportation, and necessary medical care during the in-country period. While the Inspected Party furnishes or provides for such services for inspectors carrying out inspection activities by means of continuous portal monitoring pursuant to paragraph 6 of Article XI of the Treaty, all costs connected with their stay will be borne by the Inspecting Party.

Paragraph 6 of Section V requires the Inspected Party to provide, at the point of entry, parking, security protection, servicing, and fuel for the aircraft of the Inspecting Party. The fuel and servicing shall be at the Inspecting Party's expense.

Paragraph 7 of Section V states that, for inspections on the territory of a Party, the point of entry used must be that which is closest to the inspection site. The inspection team leader for an inspection conducted pursuant to paragraph 3, 4, or 5 of Article XI of the Treaty will inform the in-country escort at the point of entry of the type of inspection and the inspection site no later than the time specified according to subparagraph 1(a) of Section IV of the Protocol.

SECTION VI—GENERAL RULES FOR CONDUCTING INSPECTIONS

The general rules governing the conduct of inspections are set forth in Section VI. These rules are diverse, governing what inspectors may and may not do, what may be brought into a country where an inspection is to take place, and include safety procedures and procedures for the completion of an inspection.

Paragraph 1 of Section VI states that inspectors will discharge their functions in accordance with the Protocol.

Paragraph 2 of Section VI forbids inspectors to disclose information they receive during an inspection except as authorized by the Inspecting Party. It also states that this obligation applies even after their assignment as inspectors has ended.

Paragraph 3 of Section VI requires inspectors not to interfere directly with any ongoing activities at the inspection site and to avoid unnecessarily hampering or delaying the operation of the facility or taking actions affecting its safety. While inspectors may, as required to conduct the inspection, request their escorts to undertake actions that would interfere with normal activities at a site, this provision is designed to prevent inspectors from undertaking such actions themselves.

Paragraph 4 of Section VI requires that inspections be conducted in accordance with the objectives set forth in Article XI of the Treaty as applicable for the type of inspection specified. Thus, if a Party specifies that it is going to conduct a particular type of inspection (e.g., a "close-out" inspection), it must then conduct the inspection in accordance with the objectives specified in Article XI for that type of inspection.

Paragraph 5 of Section VI states that the in-country escort has the right to accompany and assist inspectors and aircrew members during the in-country period. Movement and travel of inspectors and aircrew members will be at the discretion of the in-country escort, except as otherwise provided in the Protocol.

Paragraph 6 of Section VI states that inspectors carrying out inspection activities by means of continuous portal monitoring pursuant to paragraph 6 of Article XI of the Treaty may, with permission of the in-country escort, undertake local leisure travel within 50 kilometers of the inspection site. The distance of 50 kilometers is calculated on the basis of a 50 kilometer radius extending from the inspection site. At the discretion of the Inspected Party, such inspectors undertaking local leisure travel may be accompanied by the in-country escort.

Paragraph 7 of Section VI ensures the right of inspectors to be in communication by telephone with their embassy within the territory of the country in which the inspection site is located, using the telephone communications provided by the Inspected Party.

Paragraph 8 of Section VI states that representatives of the inspected facility will be included among the in-country escort at the inspection site.

Paragraph 9 of Section VI provides that inspectors may bring to the inspection site documents, linear measurement devices, cameras, portable weighing devices, radiation detection devices, and other equipment that has been agreed upon. The characteristics and method of use of this equipment will be agreed upon within 30 days after entry into force of the Treaty. During inspections conducted pursuant to paragraph 3, 4, 5(a), 7, or 8 of Article XI of the Treaty, inspectors may use any of the above listed equipment, other than cameras which will be operated only by the Inspected Party upon the request of the Inspecting Party. Upon the request of inspectors, the in-country escort will take duplicate, instant development photographs of inspected facilities with the Inspecting Party's cameras. Each Party will then receive one copy of every photograph. Thus, for all inspections, cameras will be operated only by the Inspected Party. During inspections conducted pursuant to subparagraph 5(b) of Article XI of the Treaty, all measurements, including photographs, will be made by the Inspected Party at the Inspecting Party's request.

Paragraph 10 of Section VI provides that, for inspections conducted pursuant to paragraph 3, 4, 5, 7, or 8 of Article XI of the Treaty, inspectors will permit the in-country escort to observe the equipment used during the inspection.

Paragraph 11 of Section VI provides that the measurements recorded during inspections must be certified by a member of the inspection team and a member of the in-country escort at the time of measurement. Such certified data will be included in the inspection report. Thus, measurements taken by either Party shall be observed by the other Party in order to certify the accuracy of that information.

Paragraph 12 of Section VI provides that inspectors may request (through the in-country escort) clarifications of ambiguities arising during an inspection. The in-country escort will provide the inspection team, during the inspection, with such clarification as may be necesssary to remove the ambiguity. In the event questions about buildings or objects remain, the Inspected Party will photograph the object or building as requested by the Inspecting Party. If questions still remain, a description of them, any clarification provided, and a copy of any photographs taken will be included in the inspection report. Unresovled issues may be discussed within the framework of the Special Verification Commission established by Article XIII of the Treaty.

Paragraph 13 of Section VI requires inspectors to observe safety regulations established at the inspection site, including regulations relating to the protection of controlled environments within a facility and regulations relating to personal safety. The Inspected Party is required to provide any protective gear that is needed.

Paragraph 14 of Section VI provides that, for inspections conducted pursuant to paragraph 3, 4, 5, 7, or 8 of Article XI of the Treaty, all pre-inspection procedures must be completed within one hour of arrival of the inspection team at the inspection site. Thus, this provision applies to all inspections except for continuous portal monitoring activities conducted pursuant to paragraph 6 of Article XI of the Treaty. Inspections are to begin immediately upon completion of pre-inspection procedures and may not exceed 24 hours, except for an inspection conducted pursuant to paragraph 6, 7, or 8 of Article XI of the Treaty. The 24-hour limit may be extended for inspections conducted pursuant to paragraphs 3, 4, and 5 of Article XI of the Treaty, with the agreement of the in-country escort, by no more than eight hours. Post-inspection procedures, including completion of the inspection report, are to be completed at the site within four hours after completion of the inspection.

Paragraph 15 of Section VI limits the number of inspectors on inspection teams. Inspection teams may include no more than ten inspectors, except for an inspection team carrying out an "elimination" inspection pursuant to paragraph 7 or 8 of Article XI of the Treaty, which may include no more than 20 inspectors, and except for inspection teams conducting inspection activities by means of continuous portal monitoring pursuant to pararaph 6 of Article XI of the Treaty, which may include no more than 30 inspectors. At least two inspectors on each team must speak the language of the Inspected Party. An inspection team will operate under the direction of a team leader and a deputy team leader. At the inspection site, the inspection team may divide itself into subgroups consisting of no fewer than two inspectors each, and only one inspection team will be allowed at a particular site at any one time.

Paragraph 16 of Section VI provides that, except in the case of an inspection conducted pursuant to paragraph 3, 4, 7, or 8 of Article XI of the Treaty, an inspection team will, upon completion of post-inspection procedures, return promptly to the point of entry from which it commenced inspection activities, and then leave the territory of the country in which the inspection site is located within 24 hours. A party may conduct sequential "baseline," "close-out," and "elimination" inspections with the same inspection team. In the case of an inspection conducted pursuant to paragraph 3, 4, 7, or 8 of Article XI of the Treaty, if the inspection team intends to conduct another inspection it will notify the Inspected Party of its intent either upon return to the point of entry (using the procedures specified in paragraph 7 of Section V and paragraph 1 and 2 of Section VII of the Protocol) or upon completion of post-inspection procedures at the previous inspection site. The Inspecting Party will be transported to the new inspection site by the Inspected Party, without unjustified delay, by means and routes chosen by the Inspected Party.

SECTION VII—INSPECTIONS CONDUCTED PURSUANT TO PARAGRAPH 3, 4, OR 5 OF ARTICLE XI OF THE TREATY

Section VII set forth the detailed procedures for "baseline," "close-out," and "short-notice" inspections conducted pursuant to paragraphs 3, 4, and 5, respectively, of Article XI of the Treaty.

Paragraph 1 of Section VII provides for the Inspected Party to implement pre-inspection movement restrictions at the inspection site within one hour of specification of the inspection site by the Inspecting Party. During this period of restrictions, no missile, stage of a missile, launcher, or support equipment subject to the Treaty may be removed from the site.

Paragraph 2 of Section VII provides that the Inspected Party will transport the inspection team from the point of entry so as to ensure the arrival of the inspection team at the inspection site within nine hours of specification of the site to be inspected.

Paragraph 3 of Section VII provides that, for inspections in Basing Countries, the aircrew of the Inspected Party may include representatives of the Basing Country.

Paragraph 4 of Section VII provides that neither Party may conduct more than one "short-notice" inspection pursuant to subparagraph 5(a) of Article XI of the Treaty at any one time, more than one "short-notice" inspection pursuant to subparagraph 5(b) of Article XI of the Treaty at any one time, or more than ten "baseline" inspections pursuant to paragraph 3 of Article XI of the Treaty at any one time.

Paragraph 5 of Section VII provides that the boundaries of inspection sites will be the boundaries set forth in the MOU.

Paragraph 6 of Section VII provides that, in the case of a "baseline" inspection or "short-notice" inspection of a declared facility, upon arrival of the inspection team at the inspection site the in-country escort will inform the inspection team leader of the number of missiles, stages of missiles, launchers, support structures, and support equipment subject to the Treaty at the inspection site and provide a diagram of the inspection site indicating the location of such items.

Paragraph 7 of Section VII provides that the inspection team may, subject to the provisions of paragraphs 8 through 14 of Section VII, inspect the entire inspection site, including the interior of structures, containers, and vehicles with dimensions equal to or greater than the dimensions specified in Section VI of the MOU for the missiles, missile stages, launchers, or support equipment of the Inspected Party.

Paragraph 8 of Section VII sets forth the procedures for physical on-site inspections: (i) external visual observation only (including measurement of dimensions) of missiles, stages of such missiles, or launchers subject to the Treaty, and of containers that the Inspected Party declares to contain a missile or stage of such missile of the Inspected Party subject to the Treaty and that are not large enough to contain more than one such missile or missile stage of the Inspected Party subject to the Treaty; (ii) inspection only by weighing or visual observation of a container's interior, for containers large enough to contain missiles or stages of such missiles subject to the Treaty that the Inspected Party declares do not contain a missile or missile stage of the Inspected Party subject to the Treaty (except as provided in subparagraph (iii) below, or during "short-notice" inspections of formerly declared facilities); (iii) external inspection only (including use of radiation detection devices, visual observation, and linear measurements of the dimensions of the canister) of launch canisters associated with a type of missile not subject to the Treaty and declared by the Inspected Party to contain such a missile.

Paragraph 9 of Section VII provides that structures or containers not large enough to contain a missile, stage of such missile, or launcher of the Inspected Party subject to the Treaty are subject to external visual inspection only (including measurement of dimensions) to confirm that they are not large enough to contain a missile, missile stage, or launcher of the Inspected Party subject to the Treaty.

Paragraph 10 of Section VII states that if the Inspected Party satisfies an inspection team that an interior space within a structure is not accessible by the smallest missile, missile stage, or launcher of the Inspected Party subject to the Treaty, that space may not be inspected further. Moreover, if an inspector can ascertain by means of visual inspection of the interior of an enclosed space from its entrances that the space does not contain any missiles, missile stages, or launchers of the Inspected Party subject to the Treaty, that space may not be inspected further.

Paragraph 11 of Section VII provides that an inspection team may patrol the perimeter of the inspection site and may station inspectors at the exits for the duration of the inspection.

Paragraph 12 of Section VII provides that the inspection team may, during inspections, inspect any vehicles capable of carrying missiles, missile stages, launchers, or support equipment of the Inspected Party subject to the Treaty and that no such vehicle will leave the site during the inspection until it has been inspected.

Paragraph 13 of Section VII provides that, prior to inspection of a building, the inspection team may station subgroups at the exits that are large enough to permit passage of missiles, missile stages, launchers, or support equipment of the Inspected Party subject to the Treaty. During the period of the building inspection, no vehicles or objects capable of containing missiles, missile stages, launchers, or support equipment of the Inspected Party subject to the Treaty may leave the building until inspected.

Paragraph 14 of Section VII provides that during a "short-notice" inspection of a formerly declared facility conducted pursuant to subparagraph 5(b) of Article XI of the Treaty, it will be the responsibility of the Inspected Party to demonstrate that a shrouded or environmentally protected item that is equal to or larger in size than the smallest missile, missile stage, or launcher of the Inspected Party subject to the Treaty is not, in fact, such an item. This may be accomplished by partial removal of a shroud or environmental protection cover, by measuring or weighing the covered item, or by other methods. There may be no further inspection of the object if the Inspected Party satisfies the inspection team that the object is not a missile, missile stage, or launcher of the Inspected Party subject to the Treaty. If the container is a launch canister associated with a type of missile not subject to the Treaty (and so declared by the Inspected Party), it is subject to external inspection only (including the use of radiation detection devices, visual observation, and linear measurement).

SECTION VIII—INSPECTIONS CONDUCTED PURSUANT TO PARAGRAPH 7 OR 8 OF ARTICLE XI OF THE TREATY

Section VIII provides detailed procedures for inspections of elimination of missiles, launchers, and support equipment subject to the Treaty. The precise actions that must be undertaken in order to accomplish such elimination are set forth in the Protocol on Elimination. As required by paragraph 7 of Article XI, inspectors are required to be present during the process of elimination.

Paragraph 1 of Section VIII states that inspections of the elimination process carried out pursuant to paragraph 7 of Article XI of the Treaty will be conducted according to procedures in this paragraph and the Protocol on Elimination.

Subparagraph 1(a) states that inspectors will be provided with a schedule of elimination activities upon arrival at the elimination facility.

Subparagraph 1(b) provides that inspectors will compare the data provided by the Inspected Party, in its notification of elimination required in subparagraphs 5(c) or 5(d) of Article IX of the Treaty, with the actual number and types of missile systems to be eliminated at the elimination site, prior to the initiation of elimination.

Subparagraph 1(c) states that (subject to paragraphs 3 and 11 of Section VI of the Protocol) inspectors will observe the execution of elimination procedures as provided for in the Protocol on Elimination and will have the right to call to the attention of the in-country escort the need for strict compliance with such procedures. The completion of such procedures will be confirmed in accordance with the procedures set forth in paragraph 8 of Section II of the Protocol on Elimination.

Subparagraph 1(d) states that inspectors may ascertain visually that a missile to be eliminated by launching is a missile of a type subject to elimination and may observe such a missile (from a safe location specified by the Inspected Party) until completion of its launch. During the inspection of a series of launches, the Inspected

Party will determine the means and route for the transportation of the inspection team between inspection sites. Paragraph 5 of Article X of the Treaty stipulates that each Party may eliminate up to 100 of its intermediate-range missiles by launching, provided that it does so within the first six months after entry into force of the Treaty.

Paragraph 2 of Section VIII states that inspections of the elimination of items carried out pursuant to paragraph 8 of Article XI of the Treaty (i.e., elimination *in situ*, by loss or accidental destruction, for training items, or by static display) will be conducted in accordance with the appropriate procedures set forth in the Protocol on Elimination or as otherwise agreed by the Parties.

SECTION IX—INSPECTION MONITORING CONDUCTED PURSUANT TO PARAGRAPH 6 OF ARTICLE XI OF THE TREATY

Section IX contains the procedures to be followed by the Parties for the establishment and operation of continuous portal monitoring systems on each other's territory. Upon entry into force, such systems shall be established in the Soviet Union at the SS-25 final assembly facility in Votkinsk, and in the United States at those parts of the Hercules Plant Number 1 in Magna, Utah, as specified in the MOU.

Paragraph 1 of Section IX provides that the Inspected Party will maintain an agreed upon perimeter around the periphery of an inspection site and will designate one portal for each site through which not more than one rail line and one road will pass, and through which all vehicles that can contain an intermediate-range GLBM or longest stage of such a GLBM must exit. Note that only this single exit from a facility is referred to as a "portal."

Paragraph 2 of Section IX states that, for the purposes of this Section, the provisions of paragraph 10 of Article VII of the Treaty will be applied to intermediate-range GLBMs of the Inspected Party and to the longest stage of such GLBMs. Subparagraph 10(a) of Article VII stipulates that, for GLBMs that are stored or moved in separate stages, the longest stage of an intermediate-range or shorter-range missile will be counted as a complete missile. Subparagraph 10(b) provides that, for GLBMs that are not stored or moved in separate stages, a canister of the type used to launch an intermediate-range GLBM will be counted as a complete GLBM, unless the Inspected Party proves otherwise to the satisfaction of the Inspecting Party. Thus, throughout Section IX, wherever the phrase "intermediate-range GLBMs of the Inspected Party and the longest stage of such GLBMs" appears, the last part of that phrase applies to GLBMs that are stored and moved in separate stages, and the first part applies to other GLBMs.

Paragraph 3 of Section IX states that inspection site exits other than the portal designated pursuant to paragraph 1 of Section IX will be monitored by appropriate sensors and that there will be no more than two such exits at each site. The perimeter and the inspection site exits may be monitored in accordance with paragraph 11 of Section VII of the Protocol. Thus, all exists may be monitored with sensors and with inspectors.

Paragraph 4 of Section IX provides that the Inspecting Party may establish continuous portal monitoring systems at the portal specified in paragraph 1 above, and may establish appropriate sensors at the exits specified in paragraph 3 above. It may also carry out necessary engineering surveys, construction, repair, and replacement of monitoring systems.

Paragraph 5 of Section IX states that, with respect to the monitoring systems, the Inspected Party will provide, upon the request and at the expense of the Inspecting Party: all necessary utilities for their construction and operation; basic construction materials; site preparation; transportation of necessary installation tools, materials, and equipment from the point of entry; and telephone lines and high frequency radio equipment for in-country communication with the embassy of the Inspecting Party. Thus, although the Inspecting Party pays the costs, the Inspected Party is required to provide necessary support for the monitoring systems.

Paragraph 6 of Section IX states that the Inspecting Party may, outside of the inspection site perimeter, construct up to three buildings of a specified size for a data center and inspection team headquarters and one additional building for supply and equipment storage; install systems to monitor exits (including sensors and measuring equipment); install measuring equipment at the portal; install non-damaging image producing equipment at the portal; install power sources; and use agreed-upon data authentication devices.

Paragraph 7 of Section IX provides that, during installation or operation of monitoring systems, the Inspecting Party will not deny the Inspected Party access to any existing structures or security systems or take any other actions with respect to such structures without the consent of the Inspected Party. The Inspecting Party will compensate the Inspected Party for any agreed upon rebuilding or demolition of such structures.

Paragraph 8 of Section IX provides that the Inspected Party will not interfere with the installed equipment or restrict inspecting team access thereto.

Paragraph 9 of Section IX states that, subject to the Inspected Party's radio power and frequency restrictions, the Inspecting Party may use its own radio systems for communications between inspectors and data collection centers.

Paragraph 10 of Section IX states that aircraft may not land within the perimeter of a monitored site except for emergencies and with prior notificaiton to the inspection team.

Paragraph 11 of Section IX provides that the Inspected Party must make a declaration with respect to any shipment large and heavy enough to contain an intermediate-range GLBM or the longest stage of such a GLBM of the Inspected Party. Such shipments must pass through the portal specified in paragraph 1 above. The declaration will specify whether the shipment contains a missile or missile stage as large or larger than, and as heavy or heavier than, an intermediate-range GLBM or longest stage of such a GLBM. The declaration will be made prior to the arrival of the shipment at the portal.

Paragraph 12 of Section IX provides that an inspection team may weigh and measure the dimensions of any vehicle, including railcars, exiting the site. If such a vehicle is not large or heavy enough to contain an intermediate-range GLBM or the longest stage of such a GLBM, then that vehicle will not be subject to further inspection.

Paragraph 13 of Section IX provides that vehicles exiting through the portal specified in paragraph 1 above that are large enough and heavy enough to contain an intermediate-range GLBM or longest stage of such a GLBM, but are declared by the Inspected Party not to contain a missile or missile stage as large or larger than and as heavy or heavier than an intermediate-range GLBM or longest stage of such a GLBM, will be subject to inspection. The Inspecting Party will have the right to inspect the interior of all such vehicles. If the vehicle has no container or shrouded object large enough to be or contain an intermediate-range GLBM or longest stage of such a GLBM, there will be no further inspection; if the vehicle does contain such a container or object, the Inspected Party must demonstrate that the container or object is not and does not contain an intermediate-range GLBM or longest stage of such a GLBM.

Paragraph 14 of Section IX states that vehicles, exiting through the portal specified in paragraph 1 above, that are declared to contain a missile or missile stage as large or larger than, and as heavy or heavier than, an intermediate-range GLBM or the longest stage of such a GLBM are subject to the following inspection procedures:

> (i) the integrity of the inspected missile or stage shall be preserved by the Inspecting Party;
>
> (ii) measurements will be made by the Inspecting Party using approved equipment, which will be placed only outside the launch canister or shipping container, and the measurements will be observed and certified by the in-country escort;
>
> (iii) launch canisters and shipping containers declared to contain such a missile or missile stage may be weighed and measured, and their contents imaged by the Inspecting Party in the presence of the in-country escort. The Inspecting Party may view the interior of launch canisters or shipping containers brought out from the inspection site eight times per calendar year. During such viewing, the front end of the launch canister or the cover of the shipping container will be opened, the missile or missile stage will not be removed from its canister or container, and the length and diameter of the stages of the missile will be measured in accordance with agreed methods so as to ascertain that the missile or missile stage is not an intermediate-range GLBM, or the longest stage of such a GLBM, and that the missile has no more than one stage that is outwardly similar to a stage of an existing type of intermediate-range GLBM; and (iv) the Inspecting Party may inspect any other containers or shrouded objects inside a vehicle containing such a missile or missile stage pursuant to paragraph 13 above.

SECTION X—CANCELLATION OF INSPECTIONS

Section X provides that inspections shall be cancelled if they cannot be carried out by reason of *force majeure* (i.e., a "superior or irresistible force" outside the control of the Parties that could not be avoided by the exercise of due care). In addition, if the inspection team performing a "baseline," "close-out," or "short-notice" inspection pursuant to paragraph 3, 4, or 5, respectively, of Article XI of the Treaty is delayed and fails to arrive by the specified time, the inspection may be cancelled or carried out at the Inspecting Party's option. Inspections cancelled by reason of *force majeure* or delay will not reduce the number of inspections to which the Inspecting Party is entitled. Thus, this provision gives only the Inspecting Party the option to cancel or carry out an inspection.

SECTION XI—INSPECTION REPORT

Section XI specifies the procedures the Parties will follow in filing reports concerning inspections made pursuant to the Treaty. These reports will provide a written record of the inspections.

Paragraph 1 of Section XI states that, with respect to inspections conducted pursuant to paragraph 3, 4, 5, 7, or 8 of Article XI of the Treaty (i.e., all types of inspections except inspection activities by means of continuous portal monitoring), the inspection team leader will provide the in-country escort with a copy of the inspection report no later than two hours after an inspection is completed. The report will include the type of inspection; the inspection site; the number of missiles, missile stages, launchers, and support equipment observed during the inspection; and any measurements recorded during inspections. All photographs taken during the inspection and the inspection site diagram will be attached to the report, and the report will be written in both English and Russian.

Paragraph 2 of Section XI states that, with respect to inspections carried out pursuant to paragraph 6 of Article XI of the Treaty (i.e., inspection activities by means of continuous portal monitoring), a report similar to that called for in paragraph 1 of this Section shall be provided within three days of the end of each month.

Paragraph 3 of Section XI provides that the Inspected Party may make written comments with respect to inspection reports required by this Section.

Paragraph 4 of Section XI states that the Parties will resolve, to the extent possible, ambiguities regarding factual information in inspection reports, and record any relevant clarifications in the report. Reports are to be signed by the inspection team leader and by one in-country escort. Each Party will retain a copy of the report.

FINAL PROVISIONS

The penultimate paragraph of the Protocol specifies that the Protocol is an integral part of the Treaty, that it will enter into force on the date of entry into force of the Treaty, and that it will remain in force as long as the Treaty remains in force. The paragraph also provides that the Parties may agree upon measures to improve the viability and effectiveness of the Protocol, through the Special Verification Commission established pursuant to Article XIII of the Treaty. Such measures will not be deemed to be amendments to the Treaty. Thus, while substantive obligations cannot be changed absent an agreed amendment to the Treaty, minor matters relating to the detailed inspection procedures may be altered through agreement of the Parties in order to facilitate the implementation of the Treaty regime.

The final paragraph records that the Protocol was done at Washington on December 8, 1987, in two copies, each in the English and Russian language, both texts being equally authentic.

ANNEX ON PRIVILEGES AND IMMUNITIES OF INSPECTORS AND AIRCREW MEMBERS

Much as diplomats everywhere are generally granted diplomatic privileges and immunities in order that they can carry out their duties without interference, the Parties have agreed in this Annex that inspectors and aircrew members acting pursuant to the Treaty shall also be entitled to appropriate privileges and immunities. The privileges and immunities set forth in the Annex apply to inspectors and aircrew members during the in-country period, and thereafter with respect to acts performed during the course of their official functions as inspectors or aircrew members. The Annex draws upon the Vienna Convention on Diplomatic Relations of April 18, 1961 [2] (the Vienna Convention), which is the primary international agreement governing such privileges and immunities.

Paragraph 1 of the Annex provides that inspectors and aircrew members will enjoy the inviolability accorded diplomatic agents under Artricle 29 of the Vienna Convention. Article 29 of the Vienna Convention provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Paragraph 2 of the Annex provides that the living quarters and office premises of inspectors carrying out inspection activities by means of continuous portal monitoring pursuant to paragraph 6 of Article XI of the Treaty will be accorded the inviolability and protection accorded the premises of diplomatic agents under Article 30 of the Vienna Convention. Article 30 of the Vienna Convention provides, in pertinent part: "1. The private residence of a diplomatic agency shall enjoy the same inviolability and protection as the premises of the mission."

Paragraph 3 of the Annex provides that the papers and correspondence of inspectors and aircrew members will enjoy the inviolability accorded to the papers and correspondence of diplomatic agents pursuant to Article 30 of the Vienna Convention, and that the aircraft of the inspection team will be inviolable. Article 30 of the Vienna Convention provides, in pertinent part: "2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability."

Paragraph 4 of the Annex provides that inspectors and aircrew members will be accorded the immunities of diplomatic agents pursuant to paragraphs 1, 2, and 3 of Article 31 of the Vienna Convention, but that these immunities may be waived by the Inspecting

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[2] Vienna Convention on Diplomatic Relations, done at Vienna on April 18, 1961, 23 UST 3227, 500 UNTS 95. The United States and the Soviet Union are both parties to the Vienna Convention.

Party if that Party believes that immunity would impede the course of justice and if it believes that the waiver would not prejudice implementation of the Treaty. Paragraphs 1, 2, and 3 of Article 31 of the Vienna Convention provide:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> 2. A diplomatic agent is not obliged to give evidence as a witness.
>
> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

Paragraph 5 of the Annex provides that inspectors carrying out inspection activities by means of continuous monitoring pursuant to paragraph 6 of Article XI of the Treaty will have the same exemption from dues and taxes accorded to diplomatic agents pursuant to Article 34 of the Vienna Convention. Article 34 of the Vienna Convention provides that:

> A diplomatic agent that shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
>
> (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
>
> (b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39 [of the Vienna Convention];
>
> (d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
>
> (e) charges levied for specific services rendered;
>
> (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23 [of the Vienna Convention].

Paragraph 6 of the Annex states that inspectors and aircrew members may import, without payment of customs duties or related charges, articles for their personal use, except for articles that are prohibited by law or controlled by quarantine regulations.

Paragraph 7 of the Annex states that inspectors and aircrew members may not engage in any professional or commercial activity for personal profit on the territory of the Inspected Party or that of a Basing Country.

Paragraph 8 of the Annex states that the Parties will consult in the event that the Inspected Party considers that there has been an abuse of the privileges and immunities specified in the Annex.

ARTICLE-BY-ARTICLE ANALYSIS OF THE AGREEMENT AMONG THE UNITED STATES OF AMERICA AND THE KINGDOM OF BELGIUM, THE FEDERAL REPUBLIC OF GERMANY, THE REPUBLIC OF ITALY, THE KINGDOM OF THE NETHERLANDS AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND REGARDING INSPECTIONS RELATING TO THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE ELIMINATION OF THEIR INTERMEDIATE-RANGE AND SHORTER-RANGE MISSILES

STRUCTURE AND OVERVIEW OF THE AGREEMENT

The Basing Country Agreement (the Agreement) consists of seven Articles and an Annex on the privileges and immunities of inspectors and aircrew members.

The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles confers the right to conduct inspections not only in the United States and the Soviet Union, but also within the territory of other countries within which U.S. and Soviet missile systems subject to the Treaty are located. In order for the United States to guarantee Soviet access to the territory of its Western European Allies for the purpose of conducting inspections, the authorization of the Allies had to be obtained. In the Basing Country Agreement, the Basing Countries agree to permit inspections on their territory and to facilitate on their territory the implementation by the United States of its obligations under the Treaty and the Protocol on Inspection. The undertakings of the Basing Countries in the Basing Country Agreement correspond to the underlying undertakings of the United States in the Treaty, including the Protocol on Inspection.

ARTICLE I—GENERAL PROVISIONS

Article I sets forth the general provisions of the Agreement, including authorization of Soviet inspections in the Basing Countries, facilitation by the Basing Countries of U.S. obligations under the Treaty, including the Protocol on Inspection, various reservations of rights by the Basing Countries, and the undertaking by the United States to remain responsible for its obligations and to protect and preserve the rights of the Basing Countries under the Agreement.

Paragraph 1 of Article I constitutes the basic agreement of the Basing Countries that the inspection activities provided for in Article XI of the Treaty may take place on their territories. Paragraph 1 also stipulates that such inspections must be carried out in accordance with the requirements, procedures, and arrangements set forth in the Protocol on Inspection. Article XI of the Treaty describes the various types of inspections which each Party may conduct, including "baseline" initial inspections to verify the updated data provided immediately following entry into force of the Treaty (paragraph 3), "close-out" inspections to verify the elimination of specified facilities (paragraph 4), "short-notice" inspections of specified facilities (paragraph 5), inspection of the process of elimination (paragraph 7), and inspections to confirm the completion of the process of elimination (paragraph 8). The protocol on Inspection specifies the procedures that govern the conduct of each type of inspection.

Paragraph 2 of Article I constitutes the Basing Countries' undertaking to facilities implementation by the United States of its obligations under the Treaty with respect to inspection activities taking place on their territories.

Paragraph 3 of Article I confirms the principle that, except as otherwise agreed, the Basing Countries reserve their sovereign authority to enforce their laws and regulations with respect to persons entering, and activities taking place within, their jurisdiction.

Paragraph 4 of Article I sets forth the understanding that the Basing Countries assume no obligations and grant no rights deriving from the Treaty or the Protocol on Inspection other than those expressly undertaken or granted in the Agreement.

Paragraph 5 of Article I confirms that the United States remains fully responsible to the Soviet Union for the fulfillment of its obligations under the Treaty and the Protocol on Inspection with respect to U.S. facilities located in the Basing Countries. Paragraph 5 also sets forth the commitment of the United States to the Basing Countries to take such action, in exercising its rights under the Treaty and the Protocol on Inspection, as may be required to protect the rights and the Basing Countries under the Agreement.

ARTICLE II—DEFINITIONS

Article II sets forth the definitions of the terms used in the Agreement. Definitions are provided for the following terms: (1) Treaty, (2) Inspection Protocol, (3) Inspected Party, (4) Inspecting Party, (5) Inspection team (6) inspector, (7) diplomatic aircrew escort, (8) inspection site, (9) period of inspection, (10) point of entry, (ii) in-country period, (12) in-country escort, and (13) aircrew member.

Paragraph 1 of Article II defines "Treaty" as the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles.

Paragraph 2 of Article II defines "Inspection Protocol" as the Protocol Regarding Inspection Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles.

Paragraph 3 of Article II defines "Inspected Party" as the United States.

Paragraph 4 of Article II defines "Inspecting Party" as the Soivet Union.

Paragraph 5 of Article II defines "inspection team" as those inspectors designated by the Inspecting Party to conduct a particular inspection activity.

Paragraph 6 of Article II defines "inspector" as an individual who is proposed by the Soviet Union to carry out inspections pursuant to Article XI of the Treaty, and who is included on its list of inspectors in accordance with section III of the Protocol on Inspection. Section III of the Protocol provides for the naming of proposed inspectors and aircrew members by each Party to the Treaty and specifies the grounds on which the other Party may object to an individual.

Paragraph 7 of Article II defines "diplomatic aircrew escort" as that individual who is accredited to the government of the Basing Country in which the inspection site is located and who is designated by the Inspecting Party to assist the aircrew of the Inspecting Party.

Paragraph 8 of Article II defines "inspection site" as the area, facility, or location in a Basing Country at which an inspection provided for in Article XI of the Treaty is carried out.

Paragraph 9 of Article II defines "period of inspection" as the period from initiation of the inspection at the inspection site until completion of the inspection at the inspection site, exclusive of the time spent on any pre-inspection and post-inspection procedures.

Paragraph 10 of Article II defines "point of entry" as: Brussels (National) for Belgium; Frankfurt (Rhein Main Airbase) for the Federal Republic of Germany; Rome (Ciampino) for the Republic of Italy; Schiphol for the Kingdom of the Netherlands, and RAF Greenham Common for the United Kingdom of Great Britain and Northern Ireland.

Paragraph 11 of Article II defines "in-country period" as the period from the arrival of the inspection team at the point of entry until departure of the inspection team from the point of entry to depart the country.

Paragraph 12 of Article II defines "in-country escort" as the official or officials specified by the Inspected Party, one or more of whom may be nominated by the Basing Country within whose territory the inspection site is located, who shall accompany an inspection team throughout the in-country period and provide appropriate assistance to an inspection team in accordance with the provisions of the Protocol on Inspection, throughout the in-country period.

Paragraph 13 cf Article II defines "aircrew member" as an individual, other than members of an inspection team, diplomatic aircrew escort, and in-country escort, on the aircraft of the Inspecting Party. The paragraph also stipulates that the number of aircrew members per aircraft shall not exceed ten.

ARTICLE III—NOTIFICATIONS

Article III sets forth the commitment of the United States to provide each Basing Country with advance notice of any inspections to be conducted by the Soviet Union in that Basing Country. The notifications to be provided by the United States to the Basing Countries will replicate the relevant information which the Soviet Union must provide to the United States under the Treaty.

Paragraph 1 of Article III provides that, upon entry into force of the Agreement, the United States and the Basing Countries will establish a method of communication (described as "channels") to receive and acknowledge receipt of notifications on an around-the-clock basis.

Paragraph 2 of Article III provides that the United States will notify the Basing Country concerned, immediately upon receipt of notice from the Soviet Union, of a pending Soviet inspection in that Basing Country, including the date and estimated time for the Soviet inspection team's arrival at the point of entry, the date and estimated time of its departure to the inspection site, the names of aircrew and inspection team members, the flight plan filed by the Soviet Union, and any other relevant information provided by the Soviet Union.

Paragraph 3 of Article III establishes that the United States will inform the Basing Country concerned of the precise location of the inspection site not less than one hour prior to the estimated departure time of the Soviet inspection team from the point of entry to the inspection site (or, in the case of successive inspections, from one inspection site to another inspection site).

ARTICLE IV—PRE-INSPECTION ARRANGEMENTS

Article IV sets forth various pre-inspection arrangements, including mechanisms for the Basing Countries to object to Soviet inspectors or aircrew members, the provision of visas and other documentation to Soviet inspectors and aircrew members, and the furnishing by the Basing Countries of standing diplomatic clearance numbers and established routes for Soviet aircraft conveying inspection teams. Article IV also addresses the privileges and immunities to be accorded inspectors and aircrew members, the waiver of customs duties, expedited customs processing, the provision of food and lodging for inspectors and aircrew members, an examination of equipment used in conducting inspections.

Paragraph 1 of Article IV provides that upon receipt of the initial list of proposed Soviet inspectors and aircrew members (or subsequent changes thereto) the United States will provide the lists to each of the Basing Countries, which must in turn notify the United States, within 15 days, of any objection to a person on the list based upon that person's having previously committed, or having been sentenced for committing, a criminal offense in, or having been expelled from, the United States or the Basing Country making the objection. If such an objection is made by a Basing Country, the United States is committed to exercise its right under the Protocol on Inspection to prevent such a person from serving as an inspector or aircrew member.

Paragraph 2 of Article IV sets forth the Basing Countries' commitment to furnish all necessary visas and related documents, within 25 days of receiving the initial list of inspectors and aircrew members (or subsequent changes thereto), to enable such personnel to carry out their inspections. Visas and documentation are to be valid for at least 24 months. The United States will immediately notify the Basing Countries of the removal of an individual's name from the list of inspectors and aircrew members, whereupon the Basing Countries may cancel such individual's visas and related documentation.

Paragraph 3 of Article IV provides that each Basing Country will notify the United States, within 25 days of entry into force of the Agreement, of the standing diplomatic clearance numbers and established international airways for the Soviet aircraft that will be transportating inspectors and equipment into its territory.

Paragraph 4 of Article IV sets forth the Basing Countries' commitment to extend to Soviet inspectors and aircrew members the privileges and immunities set forth in the Annex on privileges and immunities to the Basing Country Agreement. The Basing Countries may withdraw such extension of privileges and immunities in the event the Soviet Union fails to remove, in accordance with paragraph 7 of Section III of the Protocol on Inspection, any inspector or aircrew member who violates the conditions governing inspections. Paragraph 7 of Section III of the Protocol on Inspection states that inspectors and aircrew members are obliged to respect the laws and regulations of the country on whose territory an inspection is carried out and not to interfere in that country's internal affairs. It specifies the circumstances under which they may be removed from the lists of inspectors and aircrew members.

Paragraph 5 of Article IV provides that the Basing Countries will waive customs duties and will expedite customs processing for inspection equipment at the point of entry.

Paragraph 6 of Article IV constitutes the Basing Countries' agreement to provide, upon request, food and lodging for inspectors and aircrew at the point of entry.

Paragraph 7 of Article IV provides that the Basing Country concerned and the United States have the right to examine jointly each item of Soviet equipment to confirm that it cannot be used to perform functions unconnected with the inspection requirements of the Treaty. Any equipment unconnected with such inspection requirements will be impounded at the point of entry until the departure of the inspection team from the Basing Country concerned.

ARTICLE V—CONDUCT OF INSPECTIONS

Article V describes the role of the Basing Countries in the conduct of inspections on their territories including facilitation of movement, granting of clearances, establishment of communication capability, and the furnishing of aircraft servicing as well as housing, food, and services for inspectors and aircrew members. It also discusses extensions of inspection periods.

Paragraph 1 of Article V sets forth the Basing Countries' agreement to grant approval to the United States for Soviet aircraft to fly to the point of entry via the filed routing (or, if necessary, an amended routing) within 90 minutes of receipt of notice from the United States that a flight plan conforming to International Civil Aviation Organization (ICAO) requirements has been filed for the pending Soviet inspection.

Paragraph 2 of Article V states that the Basing Country concerned will facilitate entry into its territory and expedite customs processing for Soviet inspectors and aircrew members and their baggage and equipment.

Paragraph 3 of Article V provides that upon notification by the United States of the inspection site, the Basing Country concerned will expedite Soviet travel to the inspection site for arrival within nine hours of Soviet notification to the United States of the site to be inspected. The Basing Country and the United States will consult on the appropriate mode of transporation to the site, and the Basing country may designate the routing to the site.

Paragraph 4 of Article V provides that each Basing Country will assist the United States in establishing two-way voice communication capability for a Soviet inspection team between the inspection site and the Soviet Embassy within its territory.

Paragraph 5 of Article V provides that the Basing Country concerned will consult with the United States on aircraft servicing and on meals, lodging, and services at the point of entry and at the inspection site for Soviet inspectors and aircrew members, and that the United States will pay the costs of any such services it requests.

Paragraph 6 of Article V states that the United States will immediately notify the Basing Country concerned of any extension of the original 24-hour period of inspection, said extension not to exceed eight hours.

ARTICLE VI—CONSULTATIONS

Article VI describes means of consultation between the United States and the Basing Countries on implementation of inspection activities and other matters. It also describes disqualifications of inspectors and aircrew members, changes in points of entry, required notification and briefing of Basing Countries by the United States upon completion of inspections, and the requirement for the Basing Countries' assent to certain amendments to Article XI of the Treaty and to the Protocol on Inspection.

Paragraph 1 of Article VI provides that the United States and the Basing Countries will meet within five days of entry into force of the Basing Country Agreement to coordinate implementation of inspection activities.

Paragraph 2 of Article VI states that a meeting between the United States and any Basing Country to discuss implementation of the Basing Country Agreement will be held within five days of a request therefor by the United States or a Basing Country.

Paragraph 3 of Article VI establishes that a Basing Country may, if it deems it necessary, contact directly the U.S. inspection notification authority on urgent questions. The United States will immediately acknowledge receipt of any such inquiry or question and will give the question or problem its urgent attention.

Paragraph 4 of Article VI provides that if a Basing Country determines that a Soviet inspector or aircrew member has violated the conditions governing inspection within its territory, it may so notify the United States, and the United States will then notify the Soviet Union of the disqualification of such an inspector or aircrew member and require the individual's removal from the list of inspectors or aircrew members.

Paragraph 5 of Article VI provides that a Basing Country may change its point of entry upon six-months' prior notice to the United States.

Paragraph 6 of Article VI states that the United States will advise the Basing Country concerned upon completion of an inspection and will, upon request, brief the Basing Country on the inspection.

Paragraph 7 of Article VI establishes that the United States will not propose or accept an amendment to Article XI of the Treaty or to the Protocol on Inspection that directly affects the Basing Countries without the prior consent of the Basing Countries.

ARTICLE VII—DURATION OF THE AGREEMENT

Article VII provides that the Agreement is subject to approval by the Parties in accordance with their respective constitutional procedures. Upon required notification by each Party to each of the other Parties of such approval, the Agreement will enter into force simultaneously with the entry into force of the Treaty. The Agreement will remain in force for 13 years.

FINAL PROVISIONS

The penultimate paragraph of the Basing Country Agreement records that a single original of the Agreement was signed at Brussels, Belgium, on December 11, 1987. The paragraph also provides that the single original will be deposited in the archives of the United States Government and that the United States will transmit a duly certified copy of the Agreement to the other signatory Governments (i.e., Belgium, the Federal Republic of Germany, Italy, The Netherlands, and the United Kingdom).

[NOTE.—The Agreement has an Annex entitled "Provisions on Privileges and Immunities of Inspectors and Aircrew Members," which is substantively the same as the identically titled Annex to the Protocol on Inspection, discussed at pages 108-111 of the Report, with conforming changes to reflect its status as part of the Basing Country Agreement rather than the Protocol on Inspection.]

XI. BUDGETARY IMPACT STATEMENT

COST ESTIMATE

The Congressional Budget Office has supplied the Committee with information on the possible budgetary impact of the INF Treaty. In assessing this information, the Committee believes it is important to understand that the Administration has stated that this Treaty creates no new conventional or nuclear force requirements. Therefore, standing alone on its own merits, the Committee concludes that implementation of the treaty should result in a net savings to the United States Government.

The CBO cost estimate follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 10, 1988.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: At the request of your staff, the Congressional Budget Office has prepared a cost estimate for Treaty Document 100-11, the Treaty between the United States of America and the Union of Soviet Socialist Republics on the elimination of their intermediate-range and shorter-range missiles.

CBO estimates that in the long run the treaty would reduce dense costs because the costs of weapons destruction and treaty monitoring are less than the savings from operating the weapons being destroyed. Defense funding is provided in annual appropriations bills that are indirectly affected by the treaty; consequently, CBO measures costs and savings relative to the funding levels of its current policy baseline. Net savings could eventually be as high as $1 billion per year although there may be a transition period during which the treaty costs slightly more than its saves. All estimates are subject to important assumptions that are highly uncertain—particularly with respect to those governed by Administration funding requests and the subsequent appropriations bills.

Uncertainty affects the estimates for both the costs and the savings associated with the Treaty. CBO has no independent estimate of implementation costs of the treaty such as those for destruction of missiles, elimination of missile launchers and facilities, inspections, and testing and escort teams involved in verification of treaty compliance. CBO assumes the Defense Department's estimates for 1988 and 1989—about $200 million and $150 million, respectively—are indicative of the long run annual costs although long run costs could be lower since some of the initial spending will be on weapons destruction and other one-time costs. It is further assumed that there would be no additional conventional or other force requirements as a result of this reduction in nuclear capability.

Savings totaling as much as $1.1 billion would accrue each year from lower force levels including fewer military and civilian personnel and other lower operating costs. CBO assumes that personnel and other resources for the systems to be destroyed would not be used for other activities and that military personnel levels could be reduced by about 22,000 people. Of this amount 12,000 are directly associated with the weapons to be destroyed, and 10,000 are indirect or support personnel. In addition, civilian strengths are assumed to decline by about 3,000 people because of the assumed reductions in the support establishment.

Sincerely,

JAMES L. BLUM,
Acting Director.

XII. Additional Views of Senator Jesse Helms

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OVERVIEW

The official U.S. claim that the INF Treaty removes from Europe an entire class of nuclear weapons—those with a range between 500 and 5,500 kilometers.

The preponderance of evidence demonstrates that this claim is far from accurate.

A more nearly accurate assessment is that nuclear weapons will *not* be reduced under the terms of the Treaty. Indeed, the Treaty permits the Soviets to remove aging delivery vehicles from the nuclear weapons, and bolt new and updated delivery systems onto the existing warheads. The nuclear devices, of course, are the most expensive and difficult component to produce. By the time the Treaty is fully implemented, all the United States NATO strategic weapons in Europe will have been removed, and the Soviet Union nuclear forces targeted on Europe will have been *fully modernized*, making them at least as powerful and in fact more formidable than ever.

The Soviet Union can defeat the purpose of the INF Treaty in two ways: (1) The Soviets can defeat the Treaty by following its terms to the letter, or (2) they can defeat it by cheating. They will probably do both, at virtually no risk of being caught.

Let's elaborate: The Soviets can defeat the Treaty's purpose simply by following its terms carefully. The missiles to be eliminated are defined so restrictively that the old missile, the SS-20, is prohibited. *But* the new, enhanced version of virtually the same missile (known as the SS-25) is not. The SS-25 can do everthing the prohibited SS-20 can do, and then some. Because the Treaty exempts missiles tested *even once* at a longer range than, 5,500 kilometers, the SS-25 is left untouched by this Treaty. And, as already pointed out, can even use the same nuclear weapons removed from the SS-20's that are to be destroyed under the terms of this Treaty.

The Soviets can also defeat the Treaty's purpose by cheating. The Soviets have cheated massively on every previous arms control agreement, the President Reagan has officially reported many times.

In fact, the SS-25 itself is a violation of the constraints of SALT II. It was established clearly in the committee hearings that we do not know how many SS-20's the Soviets have produced, as reported in the press, and never will. The astonishingly wide variation of estimates by our nine intelligence agencies on the question of the number of SS-20's produced makes it certain that *we will never know* when, or if, all the SS-20 delivery vehicles have been destroyed.

The variation in our intelligence estimates, reportedly ranging from as low as 550 to at least 1,250 is far too wide to be accepted by a reasonable mind. Under the Treaty, the Soviets promise to destroy 650 SS–20 delivery vehicles; yet, if they do so, they could still have another 300 to 600 hidden as a covert force, according to evaluations reportedly emanating from the majority of our intelligence agencies. The notion that a covert missile force of that size would not be militarily significant represents the triumph of hope over commonsense.

Although some adminstration witnesses tried to maintain that such a covert force would be militarily useless without the chance to test-fire the missiles reqularly to test reliability—tests supposedly detectable—no one has refuted President Reagan's report that the Soviets had kept a similar covert force of over 100 SS–16's for 8 years without the United States detecting *either a test or the missiles themselves.* If the majority of our intelligence agencies are right about the numbers, we can be sure that the Soviets would not keep a covert missile force unless they had figured out not only how to keep it, but how to keep it in readiness.

For this reason, the verification process in the Treaty is virtually useless. The Treaty contains only quantitative criteria for the missiles to be destroyed, with no qualitative criteria at all. Thus the missiles to be destroyed could be factory rejects or dummies, as well as the aging delivery vehicles we expect. Furthermore, the onsite inspection takes place *only* at the specific places which the Soviets have pointed out beforehand. These hardly would be places where a covert force would be hidden.

It is highly significant that the Senate Select Committee on Intelligence, in its report to the Foreign Relations Committee, was extremely guarded in its assessment of the verifiability of the INF Treaty. The Intelligence Committee stated that the Treaty was verifiable only with regard to the declared sites. This means that we can "verify" the treaty *only* at the sites where there is scant possibliity of a Soviet violation. Other testimony showed that our chances of detecting a violation *outside the declared sites* were about 1 in 10. We would have to be astonishingly lucky, or the Soviets would have to be incredibly careless, for us to detect a violation.

Finally, even if a violation were detected, the Soviets would suffer no consequences. No major arms control violation of the Soviets has ever been corrected in the past. For example, the Soviets have deployed a prohibited nationwide ABM system including the capability to hand over incoming information to battle-management radars and interceptors. Yet the State Department has declined, for more than 6 months, to implement the 5-year compliance review mandated by the ABM Treaty because we would have to declare that the Soviet Union is engaged in a material breach of the ABM Treaty.

Arms control without compliance is at best an illusion. Yet this Treaty contains no compliance regime whatsoever, except for another useless Commission where we could express strong protest. The Soviets' only obligation is that they come to the Commission meeting, sit there and listen.

We know that the Soviets have cheated, are cheating, and will cheat. This Treaty can have no other result. Yet the lack of a true compliance regime signals the Soviets that we do not intend to take their violations seriously.

The net effect of the INF Treaty, therefore, is to make both conventional and nuclear war more likely. Even the threat of a conventional attack on Europe will have a profound effect on the social, political, and religious freedoms of Europe. The documented lack of freedom in Eastern Europe points to what could well happen in a Western Europe that is neutralized and intimidated by the elimination of the major NATO deterrent called for in the INF Treaty. In the end, the Treaty invites either global nuclear war or acquiescence to a future not worth looking forward to.

The INF Treaty, therefore, is fatally flawed. These flaws fall into two categories.

The first category consists of flaws which, on their face, defeat the principal object and purpose of the Treaty. The second category consists of those which raise the potential for actions which could defeat the object and purpose of the Treaty. Finally, there are issues of constitutional and international law which the Senate must consider, including consideration of cost, and the authority to dispose of U.S. property in the constitutional manner.

A. FATAL FLAWS

The fatal flaws which defeat the principal object and purpose of the Treaty include the following:

1. The treaty permits the Soviets to modernize the delivery vehicles for the SS-20 warheads—thereby retaining the same nuclear capability against Europe—while eliminating the only assured nuclear deterrent possessed by NATO.
2. The verification procedures of the Treaty provide no certainly of discovering Soviet cheating, while—based on past Soviet performance and present evidence—the Soviets may indeed have up to twice as many SS-20's as they declare in the Treaty. I have filed a top secret code word level annex to these views which is available to Senators and appropriately cleared staff in S-407 of the Capitol.
3. The treaty is overbroad in that it blocks not only future developments in nuclear weapons technology but in conventional technology as well, a circumstance scarcely, if at all, considered by the negotiators, despite the fact that inventive technology is a major advantage of the United States. Moreover, the Treaty needlessly surrenders nonnuclear weapons technology based on ground-launched cruise missiles, in an illusory pursuit of verifiability—thereby giving up a relatively cheap and highly effective conventional deterrent weapon for the defense of Europe.
4. The final data upon which the Treaty is based will not be made available until 30 days after the Treaty is ratified, thereby making it possible for the Soviets to make radical changes in the numbers of missiles to be destroyed, and defeating the already weak verification scheme.
5. The very concept of an INF Treaty alone is untenable so long as the Soviets maintain large inventories of ICBM delivery vehicles and warheads that can substitute for the missiles to be eliminated until the START negotiations are completed and implemented. Western Europe will still be targeted by

Soviet nuclear weapons, but will have nonnuclear deterrent for its own security. To maintain balanced reductions, the INF Treaty should not be ratified until START is also ratified.

B. POTENTIAL FLAWS

Other aspects of the Treaty that should be examined more closely include the following: Is the ban on intermediate-range missiles truly "global," as claimed by the administration? Press reports indicate that several Soviet missile systems used in the Middle East have INF range, but are not covered by the INF Treaty. Additionally, such reports also indicate that one system, the SS-12, explicitly prohibited by the Treaty, is now being used in the Middle East. The Treaty has no internal compliance requirement to require the Soviets to obey the terms of the Treaty. Nor is there any provision dealing with possible U.S. abrogation in the event of major Soviet violations, such as have occurred repeatedly with all other treaties between the United States and the U.S.S.R.

The prerogatives of the Senate in approving the treaties should not be surrendered to any administration or arms control bureaucrats. Changes in the terms of the Treaty should be addressed by the Senate, and not delegated to the Special Verification Commission established in the Treaty.

The Soviets can undoubtedly gain useful information by the use of 100 "elimination launches" which will be authorized during the first 6 months of the Treaty. There are also valid questions raised about the much-touted inspection procedures, as well as whether any militarily significant use can be made of missile-related equipment that will remain after the "elimination procedures" are completed. "Elimination" is a misnomer—certainly when applied to the Soviets—inasmuch as only portions of the Soviet equipment are in fact destroyed while United States-related systems are fully destroyed.

These and other specific issues relating to the text of the Treaty will be examined in a later section of these views along with significant legal and budgetary questions which have not received sufficient attention.

I. NUCLEAR WARHEAD PRESERVATION AND THE MODERNIZATION OF SOVIET MISSILE SYSTEMS

One of the first misconceptions the committee addressed with respect to the INF Treaty was the Treaty's provisions dealing with nuclear warheads. Unfortunately, a number of statements and been made by administration officials which were patently erroneous, but which made the Treaty appear to be a better proposition than, in fact, it is. The major media compounded the misconception by constantly repeating the erroneous statements by the administration spokesmen.

The administration initially gave the American people the impression that this Treaty reduces nuclear weapons. The Secretary of State said so in November during the final days of negotiations:

> * * * This treaty, which is now basically complete, will for the first time, by agreement, result in major reductions of nuclear arms.
>
> It is an important first step. The Soviet side will eliminate about 1,500 deployed INF warheads. The U.S. side will eliminate about 350. The numbers of warheads is asymmetrical because the deployments have been asymmetrical. [George P. Shultz, Press Conference, Geneva, Switzerland, November 24, 1987, Department of State Press Release No. 223.]

Two months later, on the opening day of the committee's hearings, he repeated that assertion when he stated, "The Treaty reduces nuclear weapons rather than setting guidelines for their future growth." The President and Vice President made similarly exaggerated statements as did a number of Senators in their statements on the Senate floor in December following the signing of the Treaty.

The truth is that not one nuclear weapon—not a single nuclear warhead—will be destroyed under the terms of this Treaty. Indeed, the Treaty very specifically exempts nuclear warheads and the associated guidance systems from destruction—on both sides. The Protocol on Elimination outlines the procedures for destruction of missiles and related equipment. Paragraph 3 of section II of that protocol states: "Prior to a missile's arrival at the elimination facility, *its nuclear warhead device and guidance elements may be removed.*" (Emphasis added.)

To put it in simple, layman's terms it is the *nuclear warhead* that is the real nuclear weapon. It is the nuclear warhead that explodes and causes massive destruction. Yet nuclear warheads are not reduced at all by this Treaty; rather, this Treaty calls for only certain "delivery vehicles" and related equipment to be eliminated.

Where is any meaningful reduction in armament levels, as stipulated by the President's arms control objectives? Absent. Indeed, not only is there no *meaningful* reduction, *there is no reduction at all.*

The obvious question arises: What are the Soviets going to do with their nuclear warheads, which are preserved by the Treaty? Is it possible that they may take these nuclear warhead devices off the missiles to be destroyed and rebolt them on new missiles—different missiles not covered by this Treaty, missiles targeted on Europe, or even the United States?

On February 1, Senator Lugar asked Defense Secretary Carlucci, "What do we anticipate the Soviet Union will do with their nuclear explosive devices, and what actions do we plan?" As part of his response, Secretary Carlucci stated in oral testimony:

> * * * The Soviets would probably try to recycle their fissionable material for use on some of their other systems. This could not be done, in our judgment, without some redesign and some testing.

That was the response given by Secretary Carlucci on February 1. However, in the edited transcript of Secretary Carlucci's comments, the second sentence—which was supposed to relieve Senators' concerns—has been deleted. While some treaty proponents tried to minimize the possibility that the Soviets might rebolt their warheads to newer missiles, such as the SS-25—which can also strike at the United States—additional testimony made it quite clear this is precisely what the Soviets could do, and may well be expected to do.

A panel of former Secretaries of Defense was questioned about this same issue on February 2. The question was asked, "How do you answer critics who would argue that even though the Soviet nuclear warhead designs might not be superior to our own, they could be readily adapted to other weapon systems not covered by the Treaty; that, having moved one off an SS-20, you could shift it over to an SS-25 and bolt it right on?"

Former Defense Secretary James R. Schlesinger responded:

> Well, I think the answer to that is they could. But in the case of the United States, whenever we have a new missile system, what we do is to optimize the warhead, to take advantage of the peculiarities of that missile system to provide maximum yield, given the weights.
>
> The Soviets presumably would want to optimize as well. If they do not want to optimize, if they are prepared to accept a nonoptimal warhead, indeed, they can simply bolt these weapons on an alternative * * *

The Hon. William Schneider, Jr., testified on February 19, 1988:

> The SS-25 is not reached by the terms of the agreement but has important links to the SS-20 system eliminated by the Treaty. The SS-20 and the SS-25 share a first stage indistinguishable from each other. The two systems differ only in range and payload characteristics. The SS-25 can be configured as an effective intermediate-range system through the simple use of thrust termination techniques to give the system variable range. Indeed, the older SS-11 ICBM has had a variable range capability for many years.
>
> Moreover, the continued availability of the SS-20 upper stage guidance and control systems and the multiple warheads for that system allow the Soviets to mate these components to a variable-range SS-25, uncontrolled by the agreement. That is

to say, this could permit the circumvention of the intent of the agreement.

When the distinguished chairman of the Armed Services Committee, Senator Nunn, appeared before the Foreign Relations Committee he stated that "the Soviets could develop and deploy a 'new type' ground-launched ballistic missile replacement for the SS-20 provided that missile were tested *one time* at a range in excess of 5,500 kilometers, even if it were tested on every subsequent occasion at INF ranges." [Emphasis in the original.]

Senator Nunn was absolutely right. The artificial definition by range is a major loophole in the Treaty. The most likely path for such a "new type" missile, intended for intermediate-range deployment, but exempted from the INF Treaty by a single test in excess of 5,500 kilometers, would be a two-stage version of the SS-25, which normally has three stages. Indeed, it is not even clear that the two-stage version of the SS-25 would require a special test over 5,500 kilometers, since the two stages would already be defined by the Treaty as exempt.

Dr. Fred Eimer, Deputy Administrator for Verification at the Arms Control and Disarmament Agency testified before the Senate Foreign Relations Committee that the INF Treaty would permit the Soviets to take a two-stage SS-25 out of the portals of the Votkinsk assembly plant. We could use one of our inspections to verify that the two stages were actually SS-25 stages; but we would have to let it pass. Now of course, the warheads are bolted on in the field, not in the assembly plant. Then Dr. Eimer testified that the Soviets, in the field, could rebolt an exiting SS-20 postboost vehicle, including the warheads, on this two-stage SS-25—with only minor adjustments. At the beginning of the hearings, a number of persons scoffed at the idea that the Soviets could rebolt their SS-20 warheads on to another missile, but the testimony of expert witnesses proves the point.

If the United States questioned whether such a two-state SS-25 should be considered a "new type" prohibited by the Treaty, all the Soviets would have to do is to test it once at 6,000 kilometers, and it would be legal. Thus the Soviets would have, in effect, a modernized SS-20 fleet, using the same warheads, but with updated delivery vehicles.

In effect, this Treaty not only preserves and protects nuclear armaments, but also provides for Soviet nuclear force modernization.

The aspect that should alarm the Senate, and the American people, is that the missiles onto which the nuclear warheads could be rebolted are those aimed at the United States—not just at Europe. Indeed, this is precisely the reason why some Europeans favor the Treaty. They believe its puts the United States on the "nuclear frontline." Some Europeans may think that's a great idea, but I doubt many Americans do.

During the hearings, some witnesses and questioners attempted to defend the fact that no warheads were destroyed by this Treaty. These criticisms fell into three categories:

1. Some tried to downplay the importance of the warheads. Secretary Shultz, for example, tried to dismiss them as mere "fissionable materials," useless without the delivery vehicle. But, as a matter of fact, the warheads, often referred to by ex-

perts as the "physics package," is a device which, along with the associated guidance apparatus, is the actual weapon, far more expensive and far more technologically difficult to produce than the missile itself.

2. Some tried to imply that nuclear materials could not be safely destroyed anyway, and that they would be returned to the stockpile. That may be true for the United States, which is short of nuclear materials; but the United States has no other missile system which can use the Pershing II warheads. Thus U.S. warheads would have to be dismantled and reprocessed if they are to be used on another missile system which is not even in the planning stage. The Soviet Union has always emphasized commonality of components in procurement, using interchangeable parts whenever possible. Thus the SS-20, the SS-16, and the SS-25 all have common or similar components, and it is not surprising that the more modern SS-25 boost vehicles can be bolted on to the same warhead assembly used for the SS-20. Since the current SS-20 forces have 12 times the kilotonnage as the Pershing II forces, the advantage in retrofitting new boost vehicles to existing warheads is devastating to U.S. interests.

3. The final criticism, and a lame one, is that the U.S. negotiators never sought the destruction of warheads, and that, in the light of the scarcity of nuclear materials, it would be against our interest to do so. To make this statement is to say that arms control involving real nuclear reductions is impossible. It is not enough to get rid of aging delivery vehicles when new delivery vehicles are immediately available to the Soviets to keep the nuclear weapons viable. In the light of the gross imbalance of circumstances—the Soviets' 12 times advantage in kilotonnage, the Soviets' 4 times advantage in number of warheads, the Soviets' availability of new delivery vehicles not covered by the Treaty, as contrasted to our lack of any corresponding retrofit to U.S. warheads—all these demonstrate without question that the basic design of the Treaty is so flawed in its conception as to make any version, even a hypothetical better one, totally devastating to security the free world.

To say that it is unsporting or unfair to criticize the negotiators for not reducing nuclear weapons at all when it was never their intention to do so completely misses the point. The only good treaty is one that actually reduces nuclear weapons. If the only treaty we can achieve is one that lets the Soviets modernize their intermediate-range nuclear forces while ours are removed forever, then there should be no treaty at all.

II. DANGEROUS UNCERTAINTIES IN VERIFYING SOVIET COMPLIANCE

A. THE HEART OF THE DEBATE: HOW MANY SS–20'S?

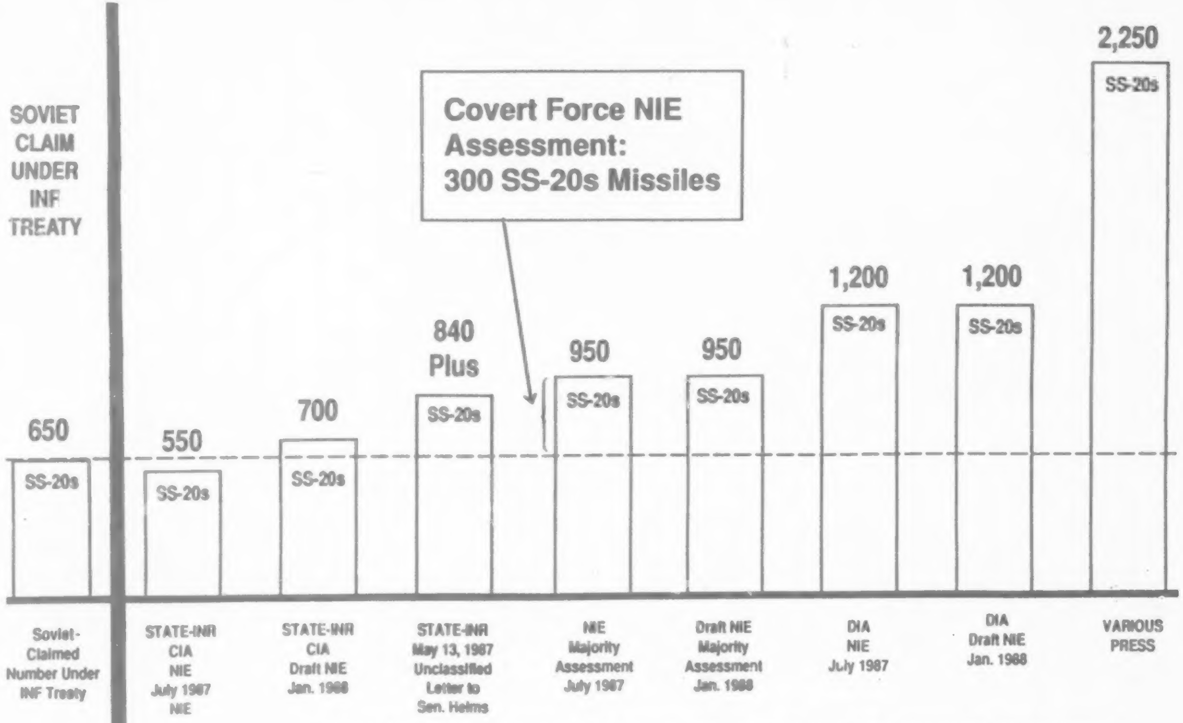
An important debate has developed over the number of SS–20 missiles which the Soviets have produced and deployed, and the number which the Soviets have officially declared for elimination under the INF Treaty. As the Select Committee on Intelligence has pointed out, the number of delivery vehicles to be destroyed can be monitored with great certainty; but the number of SS–20's in the Soviet inventory is "the unresolved controversy."

Although the exact numbers, of course, can be presented and discussed only in closed session, enough has appeared in open testimony and in the press to draw some grave conclusions. The fact is that the majority of our intelligence agencies (seven out of the nine—with the CIA and State Department INR excepted) reportedly believe that the Soviets have 300 to 600 *more* SS–20's than the 650 they have declared. I have filed a top secret code word level annex to these views which is available to Senators and appropriately cleared staff in S–407 of the Capitol.

I hope all Senators will familiarize themselves with the salient points in this debate. If the consensus estimate of our intelligence agencies is correct, then the claim that INF Treaty compliance can be verified is erroneous. Moreover, if the intelligence community is correct, then the Soviets, by failing to declare the actual inventory, are not acting in good faith.

Concealed SS-20 Missiles

RANGE OF ASSESSMENTS COMPARED WITH SOVIET CLAIM



(Attributions of numbers and sources are drawn solely from unclassified sources.)

The Range of Assessments

The accompanying bar chart summarizes the range of publicly reported assessments with regard to concealed SS-20 missiles, as compared with the number which the Soviets declared in the memorandum of understanding submitted with the INF Treaty. From this chart, it is clear that the National Intelligence Estimate of 950 SS-20's exceeds the Soviet number by 300. This is the minimum size of the covert force, as reported by the Chairman of the Joint Chiefs of Staff, Admiral Crowe, in open testimony. The explanation of each bar in the bar chart is as follows:

First, the Soviets declared that they had a maximum of 650 SS-20 missiles as of November 1, 1987, when they signed the INF Treaty on December 8, 1987. This is the total number of SS-20's that the Soviets are obligated to eliminate under the Treaty. Under the terms of the Treaty, this number of 650 is supposed to represent the total number of SS-20's ever produced and still in the hands of the Soviets.

Second, many recent press reports have stated that, in the National Intelligence Estimate of July 1987, the State Department Intelligence and Research Office (INR) both made an estimate of total 550 SS-20's produced, a number that was 100 *less* than the Soviets declared 4 months later. That failure in itself discredits the CIA/State methodology of estimating.

Third, in the draft NIE of January 1988, the press reported that the CIA/State estimate had been raised to 700, or 50 more than the Soviets admitted. This estimate made it possible for the State Department to claim publicly that the Soviet-supplied number was "within the range of our uncertainties." It is noteworthy that a DOD study earlier had concluded that 50 SS-20's was a militarily significant number.

Fourth, the State Department declared publicly on May 13, 1987, that there could be 840 SS-20's, almost at the same time when they were reportedly claiming in the NIE that there were only 550—further straining the credulity of the methodology involved.

Fifth, in the July 1987 NIE, the majority of the intelligence community, that is the four military service intelligence departments, plus the National Security Agency, reportedly all estimated that the Soviets had at least 950 SS-20's. This was the NIE best estimate, agreed to by a majority of the intelligence community. This judgment was repeated in the January 1988 draft of the current NIE, but the final draft of the NIE may well have failed to give *any* consensus estimate because of the political implications.

Sixth, both the July 1987 NIE and the January 1988 draft reportedly both contained estimates by DIA of 1,200 SS-20's produced. This is actually the most reasonable estimate when Soviet targeting requirements in Europe are taken into consideration (see further discussion below).

Seventh, responsible estimates as high as 2,250 SS-20's have been produced, based on further Soviet targeting requirements in Asia and analysis of evidence of SS-20 production and deployment under two Soviet 5-year plans, 1976-80 and 1981-85.

This estimate may be the estimate most soundly based in terms of methodology.

Note on Verification

All of these estimates, including the CIA/State underestimate of 550 SS-20's, raise severe problems with regard to verification.

Verification means the ability to judge whether the Soviets are complying with the INF Treaty. It involves not just the monitoring of events in the Soviet Union, but also the judgment as to whether those events are in compliance with the Treaty. That means we have to know:

1. How many SS-20's the Soviets have produced up to the present time (including those produced, but not deployed or deployed covertly).
2. How many SS-20's the Soviets will destroy.
3. Whether the Soviets can produce new ones without detection.
4. Whether the Soviets have the ability to hide SS-20's outside of the declared sites.
5. Whether SS-20's hidden outside of the sites can be kept in operating condition without testing.

1. Numbers.—The SS-20's is a mobile missile system, based upon the design concept of launchers and multiple reloads. The number of reloads produced for each launcher depends upon the requirements of targeting theory. The Soviets have traditionally targeted about 600 sites in Western Europe, which alone would require 1,200 warheads to assure destruction (two to each target). Since each SS-20 has 3 independently targetable warheads (MIRV) the theoretical minimum of missiles required would be 400 SS-20's. However, the Soviets assume that in battlefield conditions, half of the weapons will be inoperable, destroyed, or otherwise unavailable. So to assure that half of them could be fired, would require 800 SS-20's deployed on launchers and nearby. In addition, each launcher needs at least one missile for test firing. With 405-450 launchers, the conceptual total would be 1,250, which happens to coincide with the DIA estimate as reported in public testimony.

2. Destruction Proceduress that are destroyed.—The Treaty provides for the destruction of 650 SS-20's. We can verify that 650 missiles without warheads will be destroyed. But we cannot determine whether or not the missiles that are destroyed are functional ones. They could well be factory rejects never deployed, deployed missiles with aging components, or even uncompleted vehicles (dummies). The treaty does not provide us with any qualitative inspection.

3. Producing New "SS-20's".—The third problem is whether the Soviets can effectively produce new SS-20's under the terms of the Treaty—thereby destroying old ones, while modernizing their fleet. This can be done by calling the new SS-20's SS-25's. Administration witnesses have testified that the first two stages of the SS-25 are so similar to the SS-20, that the SS-20 postboost vehicle and the warheads can be bolted on to the first two stages of the SS-25. They further testified that the Treaty allows the Soviets to take the first two stages of the SS-25 through the portal at Votkinsk without challenge other than observation. They can bolt on the reentry vehicles and warheads in the field.

4. Hiding a Covert Force.—Once the SS–20 is in the field, it can be hidden anywhere with a no chance of detection, and no right of inspection. It can be hidden under camouflage in appropriate terrain or inside SS–25 containers on SS–25 bases.

5. Reliability of a Covert Force.—Old SS–20's never die, at least not for many years. Reliability testing can be conducted (illegally) through elimination launches, or by testing the SS–25 (legally). The SS–16 was deployed for 8 years without testing before we even discovered it.

These issues pose great difficulties for effective arms control. If the best evidence is that the Soviets are cheating on the central obligation of eliminating all intermediate-range missiles, and that we do not have the capacity to verify compliance, then the national security of our country may be in jeopardy.

During the committee markup, a detailed memorandum was prepared outlining the unclassified sources for the figures used in the chart and discussion. Subsequently, this memorandum was printed in the Congressional Record of March 29, 1988, prior to the closed session of the Senate on the same topic. The full memorandum is reprinted on pages S3205–3222 in the Congressional Record of that date.

A summary of the unclassified sources outlined in the memorandum mentioned above follows:

B. UNCLASSIFIED AND OPEN SOURCES OF SS–20 ESTIMATES

Summary

On March 21, 1988, an analysis of open-source discrepancies in the estimates of Soviet SS–20's produced was distributed to all Senators. Subsequently, the assertion was made that the analysis and attached chart revealed or confirmed code word sensitive data. The fact is that neither the analysis nor the chart contained code word sensitive data, and was based entirely on authoritative open testimony, official (unclassified) letters from the White House, the Secretary of State and the Director of Central Intelligence, unclassified DOD documents, and press accounts going back as far as 1976. The analysis and the covering letter clearly labeled the estimates as those "appearing in the public press" and "in open testimony." No suggestion was made that the estimates given were the actual estimates. Each Senator can decide for him or herself whether the unclassified numbers are accurate enough for public discussion of important public issues. It was highly inappropriate for one Senator to characterize unclassified numbers as identical to classified numbers, whether such a characterization was correct or incorrect. That is why I took strong exception to the Senator's declaration that the data in my analysis "are assessments that we heard at the time of code level" and that they were "figures * * * given in that session." My analysis was carefully drawn to avoid confirmation, but to allow public discussion. Classification is intended to protect sources and methods, and not to stifle public debate of national security issues.

Introduction

The unclassified description of concealed SS-20 missiles and accompanying chart was discussed on the Senate floor on March 4, 1988, by Senators Symms and Wallop, in the course of debate of a Symms-Wallop-Helms amendment relating to the Soviet covert SS-20 force. Attached is the Congressional Record debate, in which assurances were given by the proponents that no classified material was involved—assurances that were accepted by the chairman and vice chairman of the Intelligence Committee.

The analysis and accompanying chart were first released publicly on February 8, 1988. It was the subject of a story in Diario Las Americas on February 9, 1988, attached. It was also released to the press on February 9, 1988, in Concord, NH, after a speech on the INF Treaty given on that date.

a. *Official Unclassified Sources for SS-20 Estimates and NIE's*

1. An unclassified CIA estimate provides evidence for *over 450* SS-20 launchers. Attached is an excerpt from "Soviet Strategic Force Developments," which was testimony before a joint session of the Subcommittee on Strategic and Theater Nuclear Forces of the Senate Armed Services Committee and the Defense Subcommittee of the Senate Committee on Approrpiations, June 26, 1985, by Robert M. Gates, then the Deputy Director of CIA for Intelligence. This official unclassified source stated: "The SS-20 force of intermediate-range ballistic missiles is expected to expand to *over 450* deployed launchers by 1987."

2. The Defense Department's annual official unclassified publication Soviet Military Power from 1981 through 1987 also provides authoritative official unclassified estimates of SS-20 production. First, Soviet Military Power 1984 states that *each* SS-20 unit is assessed to be equipped with *refire missiles—one per launcher.*"

3. Combining these two pieces of CIA and DOD official unclassified data, we an easily arrive at an official unclassified SS-20 production estimate of about 900 to 950. This result is achieved merely by multiplying 2 times the 450 SS-20 launchers estimated, and adding another 50 for approximation.

4. Second, Soviet Military Power 1984 states that "The number of deployed SS-20 launchers could increase by *at least 50 percent* by the late 1980's." The same document stated that there were then 378 SS-20 launchers. Multiplying 50 percent of 378 and adding it to 378 yields 567 SS-20's estimated by the late 1980's. Multiplying this estimate by 2 for refires makes 1,134 SS-20's. This is approximately 1,200.

5. Third, by another method we can arrive at 1,000 to 1,200 SS-20's. Totaling up SS-20 production from all Soviet Military Power editions yields totals of between 1,000 and 1,200, assuming series production began in 1975. Indeed, there are two references to Soviet production of 1,000 LRINF missiles from 1976 through 1986. (This Department of Defense series is thoroughly coordinated within the intelligence community, and thus it can be regarded as an unclassified NIE.) One further piece of data is assumed for these estimates—that no SS-4's and SS-5's are included in these produc-

tion estimates, which is reasonable because these systems were being deactivated beginning about 1970, according to open sources. Thus the only "LRINF missile" system being produced in this 1975-86 period was the SS-20.

6. In sum, using three official unclassified methods and official unclassified estimates and data, we can arrive at authoritative SS-20 production estimates of about 900 to 950 or about 1,000 to 1,200.

7. The purpose of classification is to protect intelligence sources and methods. If official unclassified SS-20 production estimates range from about 900-950 to 1,000-1,200, then any *lower* estimates should be regarded as "sanitized." Any SS-20 estimates *lower* than these official unclassified estimates should not be considered classified, because they are transcended by higher official unclassified estimates. Thus lower estimates would not reveal sources and methods if higher official unclassified estimates exist and do not reveal sources and methods. Conversely, any *higher* estimates might be equally unclassified, if derived from open sources.

8. The attached December 23, 1987, unclassified letter to me from the White House establishes the fact that specific National Intelligence Estimates can be referred to in public, *even by identification number,* because the letter refers to "National Intelligence Estimate 11-3-8-87." Moreover, the attached unclassified letter to me of January 25, 1988, from CIA Director Webster also refers to "a recent *draft* of volume II of National Intelligence Estimate 4-11-88," also using the identification number. A book entitled "The Soviet Estimate," by John Prados, was published in 1982 describing many NIE's in great detail, and attached is a relevant chart extracted from the book. Thus, in sum, it is possible to discuss NIE's and draft NIE's in public, especially if no identifying NIE numbers are used. My chart did not use NIE identification numbers.

b. Unclassified Sources for Specific Estimate of 2,250

1. According to an authoritative 12-year-old press account written by a former Assistant Secretary of Defense, there were "about *1,200* SS-20's now being produced in Soviet factories" in 1976. Given later deployment during the execution of the 1976-80 5-Year plan of what turned out to be about 220 SS-20 launcher, it seems reasonable to associate about 220 SS-20 launchers with the production of 1,200 SS-20's. There seemed to be a ratio of production of five SS-20 missiles for each SS-20 launcher. If about twice as many SS-20 launchers were later deployed, including another 220 in the subsequent 1981-85 5-year plan for a total of about 441 SS-20 launchers, then it would seem reasonable to associate another 1,200 SS-20's with this increment, or a total of about 2,400 SS-20's. Alternatively, 5 times 441 is 2,205 SS-20's. The estimates of 2,250 is an approximate compromise between these estimates of 2,205 and 2,400. Boston Globe, September 5, 1976, "Soviet Mobile Missile Worries U.S." (Note also that this press report is consistent with and supports current DIA unclassified estimates of 1,200 SS-20's produced.)

2. According to the authoritative Heritage Foundation, there are up to five SS-20's for each SS-20 launcher. Using the CIA estimate of 450 SS-20 launchers, this would make 2,250 SS-20's produced. "Arms Control Handbook," The Heritage Foundation, 1987.

3. According to another press report, "Equally disconcerting to U.S. policymakers is the strong indication that for each SS-20 launcher, the Russians are now believed to have up to five missiles * * *" Combining this information with the CIA estimate of 450 SS-20 launchers also yields 2,250 SS-20's. New York Post, June 9, 1983, " 'Lost' Red Missiles."

4. According to another press report, "* * * The SS-20 force is much bigger than anyone has publicly recognized and consists of 2,205 missiles * * *" New York City Tribune, November 17, 1987, "1977 Spy Data on SS-20's Cast Shadow Over INF Talks."

5. According to another press report, "But if the ill-fated Boris—a spy for America on the Soviet general staff who was caught and executed in 1979—was accurate in his reporting to the CIA in 1976, and the SS-20 units were designed to consist of 5 missiles per launcher, the Soviets now have at least 2,205 * * *" New York City Tribune, November 18, 1987, "INF Talks Grow Shaky as Concerns Over Missiles Verification Mount in Washington."

6. According to another press report, "The Soviets are thought to have produced around 2,300 SS-20 missiles." Washington Inquirer, December 18, 1987, "Treaty Signed—Cheating Begins."

7. According to another press report, there were 2,250 SS-20's produced. New York City Tribune, December 1, 1987, "Soviet Admissions of Missiles Moscow Hid Shake Confidence of U.S. in Verification."

8. According to another press report, "The Soviets are thought to have produced around 2,300 SS-20 missiles * * *" New York City Tribune, December 8, 1987, "Soviet Ploy To Circumvent INF Pact Began With Secret Bases 2 Years Ago."

9. According to another press report, "* * * a U.S. spy in the Soviet Union said Moscow planned five missiles for each launcher." The Washington Post, December 16, 1987, "U.S. May Have Miscounted Some Soviet Missiles."

10. According to another press report, "The Defense Intelligence Agency * * * estimates total SS-20 production at 2,250 operational, refire, test, and training missiles * * *" The Washington Times, December 2, 1987, "Medium-range Missile Count Put at 2,000 by the Soviets."

11. According finally to one press account: "This has led the DIA to estimate the SS-20 count to be around 1,000, with other estimates based on Soviet plans for 4 refires of 2,250." New York City Tribune, January 27, 1988, "Helms and Shultz Are in High Stakes Duel Over Verifiability of Pact, Missile Numbers."

c. Specific Unclassified Sources for July 1987 NIE and January 1988 Draft NIE DIA Estimates of 1,200

1. According to one press report, "* * * the *DIA* believes the Soviets have produced between 1,000 and *1,200* SS-20's." The report went on to describe "a *draft* intelligence estimate now being debated among U.S. analysts." The article further stated that the debate "forced a delay in the release of a *national intelligence estimate,* an interagency report that was scheduled for completion *last week.*" The Washington Times, February 1, 1988, "Spy Agencies Disagree on Number of SS-20's."

2. According to another press report, "*Last July* * * * *DIA* figured *1,200* * * * *Just last month* * * * DIA stuck with 1,200." Both of these DIA estimates were described in the context of The National Intelligence Estimate. The Wall Street Journal, February 3, 1988, "Crimson Whales, Continued."

d. Specific Unclassified Sources for July 1987 NIE and January 1988 Draft NIE Majority Assessments of 950

1. According to one press report, "The Defense Intelligence Agency has resisted efforts to modify the position of *July* intelligence estimate that lists the number of SS–20's at *950* missiles * * * The figure is the *agreed estimate* that was derived from a compromise between lower estimates by the State Department and CIA and a higher DIA figure * * * According to the officials, a *draft* intelligence estimate *now being debated* among U.S. analysts states that the Soviets have produced *950* SS–20's * * * The differences among State Department, Pentagon, and CIA analysts over the number of SS–20 missiles have forced a delay in the release of a National Intelligence Estimate, an interagency report that was scheduled for completion *last week*. The Washington Times, February 1, 1988, "Spy Agencies Disagree on Number of SS–20's."

2. According to another press report, "The National Intelligence Estimate, a consensus view, is 950." The Wall Street Journal, February 3, 1988, "Crimson Whales, Continued."

3. According to unclassified, open testimony before the Senate Committee on Armed Services on January 25, 1988, the Chairman of the Joint Chiefs of Staff, Admiral Crowe, stated that the Soviets had "300" more SS–20's than the 650 that the Soviets declared in the INF MOU. Admiral Crowe implied that this estimate of 950 SS–20's was a DIA estimate, but the Admiral went on to suggest that DIA believed the Soviets had a covert SS–20 force of "580," implying a DIA estimate of 1,230 SS–20's. Defense Secretary Carlucci seemed to clarify this discussion by implying that the 950 SS–20 estimate was the NIE best estimate.

4. According to another press report, "Mr. Helms said *classified* Defense *Information* Agency data indicate the Soviets could have up to 300 more medium-range missiles than the 650 they say they have." The Washington Times, January 29, 1988. This was a seriously erroneous press story, and the next Monday, The Washington Times ran a correction which stated: "The Times reported in Friday's editions that Senator Jesse Helms disclosed classified information during a Senate Foreign Relations Committee hearing. This was incorrect. Senator Helms was citing unclassified information from the Defense Intelligence Agency when he charged there were discrepancies among U.S. estimates on the number of Soviet medium-range missiles covered by the INF treaty."

e. Specific Unclassified Source for State/INR Estimates of 840 Plus

1. Unclassified letter from Secretary of State Shultz to me, May 13, 1987, page 3. The letter states: "* * * in addition to the approximately 440 SS–20 missiles now deployed, there may be as many as 200–400 (or more) such missiles in the U.S.S.R.'s inventory."

f. Specific Unclassified Source for State/INR and CIA January 1988 Draft NIE Estimate of 700.

1. According to one press report, "The State Department and CIA initial estimates of the total number of SS–20's, officials said, were revised last fall from a number below 600 to about *700* * * *" This information was in the context of the description of "a draft intelligence estimate *now being debated* among U.S. analysts * * *"

2. According to another press report, "Just last month, however, the CIA and State Department reached new estimates of 700 * * *" This information was described in the context of The National Intelligence Estimate.

g. Specific Unclassified Source for State/INR and CIA July 1987 NIE estimate of 550

1. According to one press report, *"Last July* the CIA and the State Department estimated the Soviets had *550* * * *" This information was described in the context of The National Intelligence Estimate.

2. According to another press report, "The State Department and CIA initial estimates of the total number of SS–20s, officials said, were revised last fall from a number *below 600* to about 700."

C. THE FALLACY OF ONSITE INSPECTIONS AND OTHER VERIFICATION PROBLEMS

The problems of verification relating to the INF Treaty may be summarized as follows:

1. We don't know what we are looking for.
2. We don't know where to look for it.
3. If we find it, we don't know what we have found.
4. If we figure out what it is, there's nothing we can do about it.

In each case, the "it" is an SS–20, the fundamental Soviet system constrained by the INF Treaty.

These statements are literally true. Despite the aura of oversimplification that hangs about the phraseology, the INF Treaty boils down to the fact that we don't really know what it is that we are trying to verify.

We have the reassurances of experts, who are in turn reassuring each other. We have "a high degree of confidence" in the data, most of which is based on interpretation and surmises. We observe the "signature" that suggests to our experts that an SS–20 has been deployed, but the only photograph we have of an SS–20 is a forgery.

When we actually get to see an SS–20 under the Treaty, we have not way of being sure that the physical object we are looking at is actually the missile that Europe fears; or if it is the missile we think it is, we can't tell and aren't allowed to find out whether it is a real, flyable missile, or a dud, a reject, or a mockup, of which the Soviets have plenty. So when we observe that it has been destroyed, we don't know whether anything worth destroying has been destroyed.

Once all the SS–20's on all the declared sites have been destroyed, we are not allowed to go look at any other sites (not declared in the memorandum of understanding) where we have reason to believe SS-20's may be hidden. We don't know whether there is a covert force of SS-20's ready to be deployed. Nor do we know whether SS-20's, artfully disguised, may already be deployed among the SS-25 ICBM forces (illegal under SALT II), which share many of the same characteristics, or "signature."

In short, our actual knowledge of the SS-20 may be compared to a child's connect-the-dots picture of the Mona Lisa. We start with No. 1, go to No. 2, then to No. 3, and so on as the picture gradually emerges. But then we realize that it is the Soviets who are giving us the numbers. If we connect the dots in a different way, another picture may be concealed.

The Soviet Union is the only country in the world to establish a Directorate of Strategic Deception (*Maskirovka*). Its first Director was Marshal Ogarkov, who is now commander of the Soviet Western Theater of Military Operations, and thus has immediate command of the SS-20 forces proposed to be eliminated. Every arms control treaty in the past was signed by the Soviets with the full intention of using strategic deception to evade the constraints of the Treaty; the President's reports on Soviet arms control violations clearly indicate that preparations for the violations were underway before each treaty was signed.

The theme-word of the INF Treaty is *glasnost.* But the theme-word for verification of the INF Treaty may well be *maskirovka.*

We Don't Know What We Are Looking For

No one in the United States has ever seen an SS-20, nor has our intelligence community ever taken a picture of one. Every flight test of an SS-20 has been made with encrypted telemetry so we don't know the characteristics.

The SS-20, like the SS-25 and many other Soviet missiles, leaves the factory in an environmental canister that protects the missile with heaters and an inert atmosphere. The missile is delivered to the site in the canister, is erected on the launcher in the canister, and is fired through the top of the canister. Thus the missile is never in the open until it is on its deadly way.

We can think of the SS-20 in its canister like a cigar in a tube. As long as we are looking at the outside, we don't know what is in it. If we take the top off, we can see the end of the cigar, but we still can't make much judgment about the quality of the cigar.

This system contrasts with the Pershing II, which, with advances in propellants and guidance, needs no environmental protection. This means that Soviet satellites can photograph the Pershing II, but that we can never photograph the SS-20.

We identify deployed SS-20's by the so-called signature—a group of external characteristics which we believe to be associated with deployment. These include specific deployment sites, the presence of transporter-erector-launcher (TEL—a sort of massive truck for handling and launching missiles), and garages or sheds which protect the loaded TEL's from the weather and from observation by satellite, and which have roofs that open up for launching. We count the number of SS-20's by counting the number of these garages.

However, SS-20's do not have to be launched from static SS-20 sites. It is a mobile missile. The TEL's can proceed to a predetermined survey point, launch a missile, and then move to a different survey point to launch a reload. Moreover, the SS-20 can be effectively camouflaged to escape detection, particularly in the wilderness areas of the Soviet Union.

This mobility and camouflage makes it difficult to pinpoint for a retaliatory strike. The flexibility of the mobile launchers and the availability of an unknown quantity of reloads make the SS-20 (and SS-25) a formidable weapon system.

We know very little about the concept of operations for mobile missile units that are deployed in the field. We don't know how they operate, how they plan and execute camouflage, concealment, and deception, or even how long they stay in one place. Nor do we know whether all SS-20 units are located in garages, or whether some are concealed in environmental shelters, such as caves, tunnels, and so forth. Newspaper reports states that internal memos of the CIA have called for such operational studies, but none appear to have been done for lack of personnel.

To make matters more complicated, the SS-20 canister and TEL can easily be driven into the cargo bay of an Antonov 124 "Condor" transport plane and flown to any part of the Soviet Union and beyond. Admiral Crowe stated it was conceivable that SS-20's could be flown to Cuba, possibly without detection.

The difficulty of detecting mobile missile systems can be illustrated by recent reports on two other mobile missile systems. Recent press reports state that the CIA has concluded that several hundred Soviet SS-11 ICBM's have been covertly deployed in a rail-mobile mode for over 10 years. This is a large deployment that completely escaped detection.

Another example appeared in the President's report to Congress on "Soviet Arms Control Violations." The President noted that about 200 Soviet SS-16 road-mobile ICBM's were deployed between 1976 and 1984—the entire period covered by SALT I and SALT II—without detection.

Such experiences may well confirm the Soviets in their belief that illegal deployments may escape detection for a long time, and even if detected, the United States will take no action.

The SS-20/SS-25 Problem

Our knowledge of the SS-20 system is further complicated by the ambiguous elements which it shares with the SS-25 system. The SS-25 is classified as an ICBM, although it has also been tested at an intermediate-range capability. In truth, it ought to be considered a variable-range missile. Because it has both INF and ICBM capabilities, it does not meet the definition of systems to be eliminated under the INF Treaty. This in itself is a major problem in the Treaty in that it eliminates INF missiles, but the INF *capability*.

However, a completely different problem also emerges. The SS-20 and the SS-25 belong to a modular family of missiles, including the SS-16. The SS-20 and the SS-25 have identical first stages. The second stages are so similar that the Soviets are required under the terms of the Treaty to give us identifying characteristics. The third stage of the SS–25 is unique to that missile. The major visual point of identification is that the SS–25 is about 10 feet longer than the SS–20.

The SS–25 is not covered by the Treaty, but it is deployed in the same manner as the SS–20.

The Hon. William Van Cleave stated to the committee on February 19, 1988:

> The 25 becomes not only a free weapon but a variable-range 25 is legitimized because the Treaty defines for limitation purposes an intermediate-range missile as a missile whose range capabilities are above 1,000 kilometers but not in excess of 5,500 kilometers. Then it defines range capabilities as a missile's maximum-tested range. In other words, to be an IRBM by the Treaty's definition, it must not have been tested in excess of 5,500 kilometers. If it has been tested in excess of 5,500 kilometers, it becomes by definition an ICBM, even it it is capable at ranges under 5,500 kilometers.
>
> This, of course, allows a MIRVed theater-range version of the SS–25, perhaps an SS–25X or something.

When we examine the SS–25 "signature" or identifying characteristics, we find disturbing similarities. It uses the same type of launcher; it use the same type of canister; it uses the same type of garage. The only difference is that each of these items is modified to be about 10 feet longer.

Our satellites, of course, can detect the 10-foot difference. We are able to differentiate between deployments that are clearly SS–20 deployments and deployments that have the SS–25 signature. The problem is that deployments with the SS–25 signature do not necessarily have to contain SS–25's. The SS–25 canister could easily contain an SS–20 missile. The SS–25 TEL and canister could fire an SS–20 missile concealed inside. The canister would have about 10 feet of waste space, but it would not be "wasted" if the concealment deceived a U.S. satellite.

In fact, the Soviets have already begun to convert SS–20 bases into SS–25 bases by lengthening the garages. During this transition, SS–20's and SS–25's appeared to be mixed together on the same base. At the conclusion of the transition, nothing but the longer canisters and garages are in view.

Is it credible that the Soviets would conceal a fleet of SS–20's in SS–25 canisters when they could upgrade into the more modern and more powerful SS–25 without cheating? We must not define credibility by mirror-imaging our own reactions. Instead, we must consider the following:

1. At least half the SS–20's are new missiles deployed within the past 3 years.
2. It is cheaper to conceal these missiles already produced in longer canisters than to build and deploy a whole new system.
3. There is no inherent reason why both SS–20's and SS–25's could not be mixed together on the same site, all arrayed as SS–25's.
4. SS–20 troop training and reliability firing could continue using SS–25 equipment.
5. There are special uses for the SS–20 which would make it worthwhile for the Soviets to cheat.
6. The Russians invented the concept of Potemkin villages.

Onsite Inspection

As late as October 1, 1987, ACDA publications showed that the U.S. negotiating position was that a treaty should include a "suspect site" provision—"short-notice inspection of certain missile-related facilities in the United States and the U.S.S.R. at which illegal missile activity is suspected."

This is not the same thing as "anywhere, anytime" inspection. It has inherent limitations which could have been negotiated. But no such provision appears in the final treaty.

U.S. verification challenges under the INF Treaty are essentially the following:

1. Can we locate and identify all the SS-20 missiles that the Soviets have produced?
2. Can we prevent the Soviets from covertly deploying any extra SS-20's, either disguised as SS-25's or in a different covert mode?
3. Can we search effectively for covert mobile missiles throughout the huge landmass area of the U.S.S.R., and have high confidence of detecting them?

The problem with onsite inspection as defined in the Treaty is that we cannot examine suspect sites. We only have the ability to examine sites where the presence of SS-20's has already been declared by the Soviets in the Treaty. If, to take an extreme example, the Soviets were to move SS-20's outside of the fence where they are now located, we would not have the right to inspect them onsite. Our satellites might detect such an open violation, but we could not verify it on site. Of course, our satellites might never detect the violation if proper concealment measures are taken.

Moreover, if SS-20's are covertly mixed into SS-25 sites, we do not have the right to inspect them onsite.

It should be noted that while the administration is now opposing modification of this Treaty to provide onsite inspection, it is arguing just the opposite in the START context. Indeed, at the summit President Reagan and Secretary Gorbachev agreed on the following objective to be incorporated into the START treaty:

> The right to implement, in accordance with agreed-upon procedures, short-notice inspections at locations where either side considers covert deployment, production, storage, or repair of strategic offensive arms could be occurring.

If suspect site inspection is such a good idea, which it is, it should be applied to INF as well as START. Indeed, one possible modification of the INF Treaty might be to permit the same type of suspect site inspection that is permitted under a future START Treaty—since, we have been told, those inspection requirements will be *at least* as strong as the INF Treaty provisions. This is especially important since we have also been warned by the Intelligence Committee that the dangers of cheating on the INF Treaty are increased in the context of a START Treaty.

Once the 650 SS-20's are destroyed, our rights to inspect the former declared SS-20 sites are extremely limited. Moreover, the site itself is not destroyed—only the garages and the missiles. Nor does the Treaty require that the launchers be dismantled. The

Treaty forces the Soviet Union to remove the leveling jacks from the SS-20 launchers and the equipment which erects the missile and make other minor modifications to the launchers.

Once these minor modifications have been made, the launcher is never again subject to inspection. The launch vehicle can be retained. There is no reason why the Soviet Union cannot reconvert the vehicle to use as a launcher if it so desires.

It should be noted that the logistics and transportation for United States onsite inspections will be provided by the Soviets themselves. The Soviets are notorious for controlling the movements and actions of United States inspectors, much like they have controlled the movements of United States and Allied Military Liaison Mission observers in East Germany. The tragic example of the Soviet murder of Major Nicolson in 1985 while on an onsite inspection-type mission in East Germany should help us understand the Soviet attitude toward inspectors.

Late in 1987, another U.S. Military Mission observer was shot and wounded. He had just discovered a previously undetected SS-23 Brigade in East Germany with a handheld camera. This SS-23 Brigade had gone undetected for 3 years.

Finally, it is well-known that Soviets have attempted to drug and blackmail U.S. military attaches in Warsaw Pact countries. This kind of treatment is suggestive of what might be in store for U.S. onsite observers.

Destruction of SS-20's

Even the presence of observers at the destruction of SS-20's may be more misleading than informative. In destroying 650 SS-20's, we have no idea what we are destroying.

All missile production includes a high number of rejects. The United States has experienced a high proportion of missiles that were judged to be not fly-worthy. The United States, for example, forgot to declare 16 stages for the Pershing IA which had been rejected for not meeting specifications and were sitting in a warehouse.

The definitions of an SS-20 which are established in the Treaty are all quantitative, rather than qualitative. We have no way of telling whether a missile being destroyed is a real, deployable missile, or one which seems to have all the components cited, but is grossly defective in ways not detectable to the eye.

We could very well be giving official observation to the destruction of junk.

Furthermore, the Treaty allows 100 missiles to be destroyed by launching. The Soviets insisted on this number; in fact they even sought more. Although the destruction by launch supposedly limits electronic signals to those necessary for range safety, there is no reason why the Soviets could not use this procedure for flight testing to gain reliability data. If the data were encrypted, or encapsulated for later recovery from the range, the United States would be none the wiser.

What Can We Do About It?

The historical evidence is that the Soviets sign arms control treaties even while they are making preparations to evade the constraints they supposedly agree to.

When the Soviets signed the SALT I Interim Agreement on May 26, 1972, fully intending to make a large-scale replacement of light ICBM's with the concealed SS-19 heavy ICBM, which was specifically prohibited by article II of the agreement. The full intention of Soviet leaders was revealed by the extremely sensitive interception and decoding of the private summit conversation of Soviet leaders. This material has now been declassified. (See Congressional Record, April 8, 1987, pp. S-4836-46.)

Soviet leaders also signed the SALT I Interim Agreement, knowing that their argument—a successful argument—for a 3-to-2 advantage over the United States was completely invalidated by the concealed long range of their SS-N-8 SLBM.

Soviet leaders signed the SALT I ABM Treaty on May 26, 1972, which forbade integrally related, internetted, and overlapping coverage. Yet in 1973, the Soviets began to build the first of the 10 now-existing Pechora-Krasnoyarsk-Sevastopol class radars, not one of which makes sense except as part of such a system. Indeed, logistical planning for the construction of the illegal Krasnoyarsk radar began in mid-1979, just as the SALT II Treaty was being signed.

Soviet leaders signed the 1972 Biological Warfare Convention prohibiting any offensive biological warfare capability while secretly planning to expand their prohibited BW capability. In fact, the Soviets actually physically expanded their illegal BW storage and production facilities between the 1972 signing and the 1975 ratification of the BW convention.

Soviet leaders signed the SALT II Treaty in June 1979 with the secret knowledge that their now-deployed SS-25 ICBM (then under development) would also violate the prohibitions on heavy ICBM's, and that their banned SS-16 mobile ICBM was already illegally deployed.

In the SALT II Treaty signed in 1979, Brezhnev gave the United States a statement on the Soviet Backfire bomber, which was an integral part of the Treaty. But Brezhnev claimed that the Backfire did not have either a refueling capability or an intercontinental operational radius, even though U.S. intelligence already had strong evidence that it clearly had both capabilities.

Soviet leaders are now deploying the new version SS-20 Mod A, just at the moment when they have agreed to abolish this entire class of missiles. Based upon past history, should we be prepared to see such system illegally deployed in the future?

The verification system in the INF Treaty may be the best verification system ever negotiated. It may include the most comprehensive verification procedures ever included in an arms control agreement. But the best is not good enough if it does not actually permit verification.

D. ARE U.S. INTELLIGENCE CAPABILITIES SUFFICIENT TO VERIFY SOVIET COMPLIANCE?

Questions have been raised about the current status of our National Technical Means—primarily satellite observations—to monitor compliance with the Treaty.

While we have been told that the total ban on an "entire class of weapons" will make verification more certain, significant questions remain. While we can conduct specified onsite inspections, these inspections are only of sites declared by the Soviets. We have no authority to inspect "suspect sites," an objective conceded to the Soviets late in the negotiations.

Former Defense Assistant Secretary Richard Perle stated during his testimony before this committee that "the intelligence community, at least prior to the submission of the Treaty to the Senate, put the potential for verifying compliance somewhere in the 10- to 20-percent range." If his understanding is accurate, this is an astounding and disturbing statistic.

There have been many accounts in the press about the fact that our reconnaissance systems cannot detect ground activity during the night or in conditions of heavy cloud cover. Thus movements of missiles and illegal materials can take place at night, and the United States will have no ability to detect violations.

Recent accounts have also indicated that the United States has developed a system that is potentially capable of operating night and day. It has been referred to as the Indigo-Lacrosse system. Bob Woodward, in his book, "Veil: The Secret Wars of the CIA, 1981–1987," described the system:

> First code-named "Indigo" and now "Lacrosse," the new overhead satellite system would use the most advanced radar to provide all-weather and day-night capability. Using radar imaging—the enhancement of radar signals—computers could create the equivalent of photographs. Clouds and darkness would cease to be barriers. There was the possibility that sometime a future system might see through buildings. [p. 221, "Veil: The Secret Wars of the CIA, 1981–1987," Simon and Shuster, 1987.]

Apparently, the system, when implemented has enormous potential for monitoring mobile missile systems, like those banned by the INF Treaty. Unfortunately, it appears that the Indigo-Lacrosse system—if it exists at all—has been much delayed. The Washington Times reported last October:

> U.S. intelligence officials are concerned that an advanced U.S. spy satellite, grounded by the space shuttle disaster, will not be launched in time to adequately verify Soviet compliance with the proposed INF treaty.
>
> We do not have in orbit the main verification and monitoring system that was specifically designed for the mobile-missile problem," said one U.S. intelligence source * * *
>
> Another Government intelligence source described the problem of U.S. overhead reconnaissance as "acute" and said the National Reconnaissance Office, the Pentagon's spy satellite office, would be "blind" to possible Soviet arms violations without a new system identified at different times by the code

> names "Indigo" and "Lacrosse." ["New spy satellite, needed to monitor treaty, sits on ground," by Bill Gertz, The Washington Times, October 20, 1987, p. A5]

According to the article, the Indigo-Lacrosse system is too large to be put into space by any method other than the space shuttle, and the space shuttle has been grounded since early 1986. In test firings in December 1987, the space shuttle continued to demonstrate operation problems that may delay the next launch until late 1988—or even later.

The unclassified Intelligence Committee report emphasized that their affirmative assessment of the verifiability of the INF Treaty would change substantially in the context of a START Treaty.

> The U.S. intelligence community must be prepared to meet two priorities under a START environment—where the United States and the Soviet Union have agreed to reduce their strategic offensive forces while also complying with the INF, ABM, and other arms control treaties. The first involved monitoring those weapons systems and activities limited or banned by arms control treaties. The second involved military activities which are not limited by treaties, but which take on an added importance as a result of their constraints.
>
> By cutting strategic offensive forces on both sides by roughly 50 percent, a START agreement would raise the importance of intelligence on Soviet developments in other areas that would threaten the survivability and effectiveness of scaled back U.S. strategic forces
>
> Indeed, it is potential combinations of simultaneous developments in Soviet strategic offensive and defensive forces, particularly its capabilities against U.S. satellites, ballistic missile launchers, and cruise missiles that raise the most urgent concerns about threatening shifts in the strategic balance between the Soviet Union and the United States. Moreover, it is in areas not limited by a treaty where such Soviet efforts are likely to be most active.
>
> The [Intelligence] Committee accordingly recommends that the Congress authorize and appropriate funds required to initiate a long-term program to modernize and improve upon current plans for intelligence collection. It specifically recommends investing more in programs that would be most helpful in verifying a START Treaty, in preventing technological surprise and in supporting U.S. policy and operations in crises.
>
> Many of the details regarding the precise nature of our inspection rights are still being negotiated with the Soviets. A constructive process has been put in motion to secure U.S. objectives in these negotiations, although this has not yet been achieved.
>
> The extensive on-site inspection and portal monitoring that may be required by a START agreement, including suspect site inspections, could have a far more significant impact on U.S. counterintelligence and security interests than those agreed to the the INF Treaty.

Subsequent press reports of April 5 and 6 have stated that the Intelligence Committee recommended, and the President has stated his intention to approve, a major investment of $6 to $12 billion for the Indigo-Lacrosse satellite program.

The Washington Times reported on April 5:

> The Senate Intelligence Committee has requested $12 billion for six top-secret radar-imaging satellites and other high-technology spy machines it says are necessary to verify Soviet compliance with new arms accords.
>
> * * * The panel has linked its approval of the INF treaty * * * and of a Strategic Arms Reduction Talks agreement now under negotiation to enactment of a secret INF-START intelligence monitoring supplemental appropriation, the intelligence sources said. ["Senate panel asks for radar funds," by Bill Gertz, The Washington Times, April 5, 1988, p. A4]

The Washington Post of April 6 carried a column by Evans and Novak stating the President's approval of such a request:

> President Reagan has tipped national security insiders that he will approve a $6 to $12 billion satellite program to detect Soviet treaty cheating. Without it, key Senators of both parties warn him, the new START pact he hopes to sign in Moscow will be dead on arrival in the Senate. ["The Indigo-Lacrosse Satellite Gets the Nod," by Rowland Evans and Robert Novak, The Washington Post, April 6, 1988, p. A25]

Without the ability to have onsite inspections at suspect sites within the Soviet Union, the United States must rely upon its national technical means for verification. If the press reports are accurate with respect to our present satellite abilities—i.e., two aging satellites with only daytime photo-reconnaissance abilities—one must question the advisability of proceeding with such haste toward ratification of the INF Treaty.

If, indeed, we have an improved system which will present greater reconnaissance, perhaps we will be able to monitor future arms control treaties with greater confidence. But I do not want to stake approval of this Treaty on possible, future improvements in national technical means. If we're not confident of our ability to verify this Treaty based on existing national technical means, we face serious problems which, in my judgment, warrant extreme caution.

Indeed, according to at least one press account, the 20-percent verifiability Mr. Perle referred to may already assume implementation of improved satellite monitoring. The New York Tribune reported on November 16, prior to the Treaty's completion:

> * * * The group [a CIA working group on mobile missile verification] estimates that there is only a 20-percent probability of the United States detecting Soviet SS–20 mobile ballistic missiles in the field, *even with the use of significantly improved satellites, which are not yet in orbit.* [Emphasis added.] * * * Codenamed at one stage Indigo-Lacrosse * * * will have to await the refurbishment of the space shuttle, which is not expected before the middle of next year. ["Soviet Mobile Missiles Could Make It Easy To Foil Verification of an Arms Accord," by Peter Samuel, November 16, 1987.]

Despite all of the glowing accolades about the new strides in verification, much of the public testimony and news reports of classified information suggest that there is much about which to be concerned. Ultimately, is the United States being asked to trust the Soviets? If so, we do so at our peril—and that of Western Europe.

III. RESTRICTIONS, INTENDED AND POSSIBLY UNINTENDED, ON U.S. TECHNOLOGICAL ADVANTAGES

A. FUTURISTIC NON-NUCLEAR WEAPONS SYSTEMS

Both ground-launched ballistic missiles and ground-launched cruise missiles are prohibited by the terms of the Treaty if they are "weapon-delivery" vehicles.

Determining precisely what is a "weapon-delivery vehicle" has proven not as easy as it might first appear. For most of the hearings, this committee focused almost exclusively on nuclear versus conventional warheads. The concepts of "conventional" and "warhead" become blurred, however, when considering possible future technologies.

The article-by-article analysis of the administration defined the term "weapon-delivery" further as "those types of ground-launched cruise missiles that have been [Note: the past tense * * * flight-tested or deployed with any type of warhead device *or simulation thereof*." [Emphasis added.]

The Armed Service Committee noted in its report:

> This suggests that GLBM's or GLCM's which destroyed their targets through other, perhaps more futuristic or exotic, means would not be covered. If this reading is correct, then, the Treaty would appear to allow GLBM's or GLCM's that destroyed targets through such means as lasers, particle-beam generators, microwave pulse generators of perhaps even direct impact (kinetic kill).

The Armed Services Committee noted, however, that "there were indications that the administration may be interpreting this language more broadly than the explanation in the article-by-article analysis to include future weapons types such as those listed above (i.e., anything that can destroy a target)."

It is crucial that the Senate know exactly what the definition of "weapon-delivery" means to the administration, and whether this definition is shared by the Soviets.

Historically, the United States has been at the forefront of technological advances, including weapons technology. The "futuristics" issue is troublesome because of the parallels to the confusion resulting from the ABM Treaty regarding futuristic antiballistic systems.

The technology now being developed for the strategic defense initiative (SDI) is just the type of unforeseen, "futuristic" technology that could not have been known, but is permitted under the "Other Physical Principles" clause of the ABM Treaty. In my judgment, the administration's interpretation in the opposition direction for the INF Treaty would unnecessarily cause the United States to ban yet undeveloped or undeployed futuristic technology by a broad and permanent ban on intermediate-range missiles in this Treaty.

Regardless of whether one believes each party should have the right to develop futuristic technologies with intermediate ranges, as I do, it is essential that the Senate be assured that the Soviets share the same common understanding as that advanced by the administration—that such systems are totally banned.

Ambassador Glitman stated on March 30:

> During the negotiations, the United States and the Soviet Union did not specifically discuss INF missile systems using techniques, such as lasers, to destroy targets, nor did the parties specifically address the meaning of the term "weapon delivery." Instead, the parties recognized that it would be unnecessary to define in the Treaty terms which had commonly understood meanings or where the commonsense meaning of the term was intended by the Treaty.

Mr. Glitman also admitted that "the question of futuristic systems per se was not discussed," however, he stated that the negotiating record supported his contention that the Soviets clearly understood what is banned by the Treaty with regard to future type weapons systems.

I asked Ambassador Glitman to provide the references in the negotiating record on these issues which I intend to study. Based on what has been publicly presented thus far, however, it is very unclear to me, as it was to the Armed Services Committee, that there is a common understanding between the United States and Soviet negotiators on this point—contrary to Ambassador Glitman's assurances.

Indeed, Senator Nunn, during his March 28 appearance before the committee, alluded to the fact that conflicting testimony had been received on this precise point in classified testimony before the Armed Services Committee. This is a fundamentally important issue in the Treaty. A conflict in administration testimony on this issue is a severe problem and absolutely must be resolved prior to the Senate's consideration of the Treaty. I do not believe the administration has provided sufficiently persuasive evidence of Soviet acquiescence to the administration's publicly stated view.

The credibility of the administration's contention is further clouded by very recent statements attributed to former administration officials who worked closely on the treaty. Former Defense Secretary Caspar Weinberger is quoted in The Washington Times of April 14 as having said in a letter to our colleague, Senator Quayle:

> There was no understanding of any kind that I knew about that the Treaty covered anything related to these so-called futuristic weapons.
>
> There was no discussion or evaluation of the military sufficiency questions in banning futuristic weaponry that I every participated in.
>
> Everyone on our side was talking only about existing types of INF, or cruise or ballistic missiles, or types similar to them carrying a conventional type—high explosive or chemical—munition. ["Weinberger: State all wet on INF pact," by Paul Bedard, April 14, 1988, p. A1.]

Similarly, Ken Adelman, former Director of the Arms Control and Disarmament Agency, is also quoted as saying he did not recall discussions to ban new weapons during negotiations on the INF Treaty.

If the administration fails to demonstrate evidence for its view, the Senate must be prepared to amend the Treaty to clarify this issue. Thus far, there is no evidence, to my satisfaction, that a ban on futuristic systems can be found in either the text of the Treaty itself, or in the INF negotiating record. It would therefore seem that futuristic systems are, and should be, permissible.

The worst of all possible choices would be for the U.S. to take the position that all futuristics are banned while the Soviets contend that futuristics are permitted.

Adding to the uncertainty is whether the Soviets also concur with the administration's contention that certain varieties of missiles are *permitted* by the Treaty. Questions were raised about "remotely piloted vehicles" which are electronically piloted by remote control and "drones" which may have a preprogrammed flight.

Ambassador Glitman stated, "As long as those systems are not weapon-delivery systems—and, as normally used, RPV's and drones are essentially reconnaissance vehicles—they will not be restricted by this Treaty."

Of course, the underlying question is the phrase "as normally used." What is "normal" today may not be "normal" in the future. In which case, will the RPV's and drones be prohibited or permitted?

Another technology which was mentioned in open session was that of the hypervelocity glide vehicles, also known as hypersonic boost-glide vehicles. These are unmanned vehicles without engines.

The negotiators assurances that the hypervelocity glide vehicles are not restricted is hardly reassuring since they admitted they did not even know about U.S. research on such vehicles until *after* the Treaty had been negotiated. Indeed, Ambassador Glitman stated, "We didn't know about it until it was put into a report of the AEI." The American Enterprise Institute report, by Richard Perle and others concerned over specific details of the Treaty, was published February 3, 1988, 2 months after the Treaty was signed in Washington.

It is hardly comforting that our negotiators were unaware of existing research on advanced technologies which may be restricted as a result of the INF Treaty and did not seek greater clarification.

The Soviets are known to exploit treaty ambiguities. These issues are precisely the type they could use in the future—with enormously dangerous consequences for the security of the United States and NATO.

B. CONVENTIONALLY ARMED, GROUND-LAUNCHED CRUISE MISSILES

Article II, paragraph 2 of the Treaty provides that any ground-launched cruise missile "that is a weapon-delivery vehicle" is prohibited.

The effect of this prohibition is to ban both nuclear *and* nonnuclear cruse missiles. The result of the provision is uneven—and disadvantages the United States—inasmuch as the United States, not the Soviet Union, has such conventionally armed cruise missiles.

Despite the obvious fact that the Soviets have an overwhelming conventional arms superiority in Europe, we find that the one conventional arms limitation in the Treaty—a treaty presumably addressing *nuclear* arms control—applies, in practice, not to the Soviet Union, but rather to the United States. As a result, the conventional imbalance in Europe will be even greater than it is at present—and the present is a disturbing situation.

Senator John Warner was accurate in his assessment to the committee on March 22 that the issue of ground-launched cruise missiles "is the battleground that . . . will be fought over heavily by the Senate."

Former Assistant Defense Secretary Richard Perle identified the prohibition on conventionally armed cruise missiles as the single most important flaw in the INF Treaty. He recommended strongly in his testimony before this committee and the Armed Service Committee that the Treaty be amended, as encompassed in an amendment I offered during committee markup, to provide the only *nuclear* "weapon-delivery" vehicles be prohibited, not conventionally armed cruise missiles. That amendment was defeated, 12–3.

Mr. Perle, who favors the Treaty and opposes "killer amendments," recommended this modification as necessary to protect vital U.S. national security interests. He also emphasized that the modification was, for 6 years, the U.S. position—repeatedly urged by the President—during negotiations with the Soviets until it was reversed late in the INF negotiations.

He suggested during his testimony that such a modification to the Treaty wold not result in the Treaty being killed, or even renegotiated, but rather that the Soviets would accept this change. As Mr. Perle noted in testimony before the Armed Services Committee on February 4, "If the Senate is persuaded that even a change of this dimension is more than the Treaty can bear, then one can only question whether this Treaty is not so fragile as to be a risky proposition all around."

The military significance of conventionally armed cruise missiles was succinctly outlined by Mr. Perle, during his testimony to the Foreign Relations Committee on February 16:

> Nonnuclear cruise missiles with previously unimaginable accuracy, missiles capable of striking within 10 feet of their targets in any weather even when fired from great distances, could enable the United States to replace nuclear with nonnucler weapons for a class of important targets that can now be destroyed only with nuclear weapons.
>
> Such deployments would significantly raise the nuclear threshold and place even hardened targets at risk. This would create a formidable deterrent to conventional attack and diminish the need to rely on nuclear strikes to halt a conventional offensive early in a major war. And it would create a variety of options in more limited conflicts where it is inadvisable to place in jeopardy the aircraft and ships and the men who fly and man them that would otherwise bear the burden of launching cruise missiles.
>
> Ground-launched cruise missiles are likely to be far cheaper and less vulnerable to attack or attrition than those delivered

> from costly and vulnerable ships and aircraft, and because they would not carry nuclear weapons, a number of peacetime dispersal options would be available.
>
> The advantage of deploying hundreds of ground-launched cruise missiles over a wide geographic area is considerable, compared to concentrating a few cruise missiles on aircraft based at a few tens of locations or on a small number of ships. This is an advantage that ought to be seized.

This is one of the most important issues, and one which, in the full Senate, there is the strongest support—in my judgment—to address. It was an issue which prompted expressions of concern by witnesses who otherwise favored the Treaty—for example, former U.N. Ambassador Jeanne Kirkpatrick and former Defense Secretary James R. Schlesinger.

The Armed Services Committee acknowledged the significance of conventionally armed cruise missiles in its report on the INF Treaty:

> The [Armed Services] Committee recognizes the validity of the concerns expressed during its hearings over the prohibition of a potentially promising option for implementing NATO's follow-on forces (FOFA) and deep strike doctrines. Advanced technology is the Alliance's trump card, and highly accurate, unmanned, long-range, standoff weapons represent a particularly attractive means for redressing the conventional imbalance in Europe.

The argument advanced against the maintenance of conventionally armed cruise missiles is that, for purposes of verification, such missiles cannot be distinguished from cruise missiles armed with nuclear warheads and thus it is necessary to ban both in order to verify compliance with a ban on nuclear cruise missiles.

The Honorable William Schneider, Jr., Member, General Advisory Committee of the U.S. Arms Control and Disarmament Agency, testified on February 19 about the inconsistencies between this argument and other provisions in the Treaty permitting equally unverifiable *unarmed* cruise missiles:

> To enable the Alliance to offset Soviet conventional preponderance and the diplomatic consequences of that preponderance, we must be able to introduce modern conventional weapons technology. The agreement has the effect of constraining one of the most promising avenues of conventional force modernization, long-range, conventionally armed cruise missiles. To avoid complex and perhaps intractable verification problems associated with seeking to distinguish between nuclear and nonnuclear cruise missiles, the agreement bans both, but it permits unarmed, remotely piloted vehicles, a distinction equally difficult to verify.
>
> Our experience suggests that the United States will execute the terms of the agreement literally. The Soviets, however, are likely to be able to maintain a long-range, conventionally armed cruise missile under the guise of an unarmed, remotely piloted vehicle program. As a result, the ability of the Alliance to mitigate Soviet conventional military power will be severely curtailed without any offsetting benefit to the alliance.

Richard Perle elaborated on the various cheating scenarios associated with the cruise missiles:

> * * * The Treaty does allow unarmed cruise missiles. If the Soviets wished to disguise the deployment of nuclear-armed cruise missiles, they could simply claim they were unarmed reconnaissance vehicles. We would be unable to verify this claim in peacetime, and during a war, nuclear warheads could be easily added.
>
> Moreover, there is no practicable way to verify the range of a cruise missile. The Soviets could deploy a conventionally armed cruise missile with, say, a 2,000-pound warhead in a range of 500 kilometers. The substitution of a 150-pound nuclear warhead for the much heavier conventional one would enable that cruise missiles to operate at distances greatly exceeding 500 kilometers.
>
> So, it is simply wrong to assert that a ban on nonnuclear cruise missiles makes a ban on nuclear ones verifiable. It does not.
>
> The verification advantage of complicating one cheating scenario for nuclear cruise missiles when several others exist is illusory. * * *
>
> In cases where verification is nearly impossible, as it is with respect to article II, paragraph 2, the crucial issue becomes the protection of American options. Where the option in question is particularly promising and beneficial to our security, it is foolish to abandon it for all time in the idle belief that we have, thereby, solved an important verification problem.

It has also been noted that once airborne, it is impossible to distinguish whether a cruise missile was ground-launched (and thereby prohibited by the Treaty) or whether it was launched by air or sea (methods not restricted by the INF Treaty). For this reason, some have argued in favor of banning these missile systems as well, as a part of the ongoing START negotiations. On the other hand, both the Armed Services and Intelligence Committees have stressed that no such precedent should be regarded as having been established by the INF Treaty.

Similarly, while the administration's negotiators were telling our committees that verification of conventional versus nuclear ground-launched cruise missiles was impossible, newspaper reports indicate that other administration negotiators in Geneva have been putting forward verification schemes with respect to air- and sea-launched cruise missiles which assume that certain distinctions *can* be made to aid verification. If a distinction can be made, or developed, for air- and sea-launched systems, there is no known reason why such a distinction could not also be developed for ground-launched systems.

The Intelligence Committee's unclassified report also pointed out our colleagues' concerns on this issue:

> In the INF agreement, the United States has sacrificed the right to deploy a conventional long-range ground-launched cruise missile (GLCM) against the Warsaw Pact, principally because monitoring the distinction between nuclear and conventional cruise missiles is difficult. Some members of the committee believe that other national security interests may have

> been subordinated to verification considerations on the GLCM issue. This has raised serious concerns among members of the committee that similar considerations of verifiability in START could lead to unduly restrictive limitations on future U.S. options for conventionally armed air-launched and sea-launched cruise missiles.

Similarly, the Armed Services Committee report warned that the ban should not be a precedent for the START negotiations:

> * * * Banning the deployment of such systems makes it essential that START not foreclose U.S. options for conventional ALCM's and SLCM's, including systems of these types for INF ranges. The [Armed Services] Committee urges the administration not to permit the GLCM decision to set a precedent that could adversely affect U.S. national security interests with regard to conventional ALCM's and SLCM's.

Because of the tremendous potential of conventionally armed, ground-launched cruise missiles, this issue should be explored further before we unilaterally concede a militarily significant weapons system by the United States. It also argues for handling the INF Treaty in the broader context of the START negotiations, an issue which will be discussed separately.

IV. SHIFTING SOVIET DATA BASE AFTER U.S. APPROVAL

One of the most troubling aspects of the Treaty concerns the provisions of the Treaty that permit the Soviets to revise their claims *after* Senate ratification of the Treaty. The Treaty provides that despite the numbers set forth in the memorandum of understanding—which are already suspect—the Soviets could modify these numbers after U.S. ratification, apparently without any recourse by the United States.

We have a saying in North Carolina about not wanting to buy a "pig in a poke." Yet that appears to be what is being asked of the Senate if crucial elements of the Soviet data can be changed after examination by the Senate.

Article IX, paragraph 3 of the Treaty provides:

> No later than 30 days after entry into force of this Treaty, each Party shall provide the other Party with updated data, as of the date of entry into force of this Treaty, for all categories of data contained in the memorandum of understanding.

In essence, the Senate is not being presented with a final treaty, but merely a draft. The final version of all figures supplied in the memorandum of understanding, which are the core issues of each country's obligations, will be supplied 30 days after the Treaty enters into force—and after Senate advice and consent. Never before can I remember an arms control treaty being submitted which relied on *future* assessments by the Soviets.

The Soviets have a long history of exploiting treaty ambiguities and engaging in outright violations of arms control treaties; these are outlined elsewhere in these views. But even in the context of the INF Treaty, we know that the Soviets have not been forthright about providing accurate figures. For instance, prior to the final MOU figure of 650 SS-20's which the Soviets claimed, they had presented to United States negotiators four other claims. One has to wonder how many more changes in SS-20 numbers the Soviets would have put forward had their "last offer" prior to treaty signing not been accepted by U.S. negotiators.

The Working Group on the INF Treaty of the American Enterprise Institute summarized the significance of this provision:

> The United States insisted on reviewing before Treaty signature—and retaining the right to reject—the data provided for in the MOU. The data in the MOU, however, are not the data that form the basis of the Parties' obligations under the Treaty. The data that really count are those to be exchanged by the Parties 30 days after the Treaty's entry into force; the Treaty does not afford us the right to reject Soviet data supplied at that time. In fact, if the United States is unsatisfied with the information provided in the data update—e.g., if we judge the Soviets to be understating their INF force—and the Soviets fail to convince us of the accuracy of their new data,

> then the United States would have no effective recourse. As a practical matter, we would feel compelled to continue to fulfill our obligations under the Treaty. ["Article-by-Article Review of the INF Treaty," American Enterprise Institute for Public Policy Research, February 3, 1988, p. 16.]

The shifting data base underscores the verification problems inherent in the INF Treaty. We are not positive about the number of SS-20's for instance, that the Soviets have produced. We will know with even less certainty how many, if any, SS-20's they will have actually destroyed prior to the Treaty entering into force, but we will have to take the number they claim.

We will not know how many, if any, launchers they will have actually destroyed prior to the Treaty entering into force, but we will have to take the number they claim.

Yet if they have SS-20's and launchers at sites other than those declared in the Treaty, the United States has no inspection rights to find out, and even if we do learn of such a covert force, the Treaty provides no remedy for such a blatant violation.

A related area of concern was also expressed by the AEI Working Group on the INF Treaty. Other provisions of the Treaty (article X, paragraph 8), would permit the Soviets to remove missile support facilities and operating bases from the updated data base if they claim to have accomplished certain elimination procedures by the date on which the Treaty enters into force. Does the removal of these support facilities or operating bases from the updated data base simultaneously remove them from the ability to have onsite inspections during the 13-year life of the Treaty? The AEI Working Group felt the issue was unclear, and I concur. However, Ambassador Glitman provided assurances to the committee that this is an unnecessary concern.

> * * * If it is listed in the MOU and they claim it has been eliminated, we will have an opportunity to assure ourselves that it has been eliminated onsite, and we will be able for 13 years thereafter to go to that facility onsite as part of the annual quota [of inspections].

I am concerned that we may learn, to our regret, that the Soviets will attempt another interpretation in the future. If, indeed, the Soviets do refuse to let us inspect a site which they claim to have eliminated, it would be grounds for withdrawal from the Treaty, in my judgment. Ambassador Glitman commented on the seriousness of the possibility of Soviets' reneging on the interpretation he presented to the committee:

> It would certainly be a violation of the Treaty's requirements. Whether it is grounds for withdrawing is something that I think the President and the Senate of the day would want to examine.
>
> But there is no question that they would be violating the requirements of the treaty.

Of course, as mentioned elsewhere, if such a violation occurs after the 3-year period during which our Pershing II's are to be destroyed, the United States and NATO will be without a sufficient deterrent against the Soviets. The concept of unspecified future data exchanges is fundamentally flawed and should not be accepted as a component of this treaty or any treaty in the future.

V. COMPREHENSIVE ARMS CONTROL: INF IN THE CONTEXT OF START NEGOTIATIONS

The implementation of the INF Treaty will leave NATO with only a handful of nuclear battlefield weapons. The much-talked about "nuclear force" of 4,000 warheads left after INF turns out, after much examination, to be primarily battlefield weapons of little range, and even of no range, which would complicate a Soviet/Warsaw Pact advance, but not deter it. Except for a few F-111 bomber-delivered warheads, which may or may not get through (after all, the United States lost an F-111 when faced with as helpless a nation as Libya), NATO will have no strategic nuclear weapons that can strike into the Soviet heartland.

However, even assuming that all the SS-20's will be destroyed, the Soviets will still have thousands of warheads to aim at European military targets. The nature of the INF Treaty's boast of removing an entire class of weapons is that INF weapons are the only ones NATO has, while the Soviets have plenty of others to take their place. Only if a verifiable START treaty is negotiated and implemented does the rationale of the INF Treaty make sense. If the START Treaty provides a serious drawdown of nuclear weapons, then Soviet targeting will have to make some serious choices between hard targets in the United States and soft targets in Europe.

The INF Treaty is viable *only* as part of a comprehensive arms agreement dealing with all classes of missiles, not a single class. Indeed, a number of witnesses cautioned the committee that the consequences of the INF Treaty—and the consequences of possible violations—will be much greater unless a START agreement is actually achieved. To consider that INF Treaty without regard to other issues seems fraught with danger.

It seems reasonable to deal with both treaties—INF and START—comprehensively. This was the thoughtful approach recommended in the committee hearings by Dr. Eugene Rostow, former ACDA Director and a long-time observer of arms control issues. Dr. Rostow testified:

> The effort to ratify the INF Treaty before we are assured of sound agreements on the other elements in the nuclear equation violates the most basic principle of nuclear force analysis; namely, that the politico-military effects of particular nuclear forces can be evaluated only in the context of the Soviet-American nuclear balance as a whole. In 1972, Ambassador Gerard Smith, our chief negotiator in the SALT I talks, formally declared that "the supreme interests of the United States" preclude final agreement on one part of the nuclear equation until the others are dealt with as well. That policy is as sound today as it was when it was announced. It is therefore impossible to determine the politico-military significance of the INF

Treaty until we know what will happen next in the negotiations about strategic offensive and defensive systems.

The negotiating box that we will soon be in should be clear to all. Again, Dr. Rostow:

> From the point of view of negotiating tactics, ratifying INF now would be a serious mistake. Once we ratify an INF agreement, agreement on START and on defensive systems would become urgent for us. We should then be under great pressure to make concessions in order to get a START agreement and to reach an agreed position on defensive systems. Under such circumstances it would be virtually impossible for us to persuade the Soviet Union to return to the interpretation of the ABM Treaty on which the Soviet Union insisted when the Treaty was drafted and signed, and which the United States has now embraced. And it can hardly be supposed that the pressures of election-year politics in the United States would provide a favorable environment for arms control negotiations.
>
> As a matter of our national security, the United States should ratify only a comprehensive agreement, stabilizing the Soviet-American nuclear balance as a whole. For the Soviet Union, however, the best possible outcome would be the double zero INF agreement, and nothing more. Such a solution would eliminate all American nuclear weapons above the battlefield range from the soil of Europe, and leave the Soviet ICBM arsenal, space program, and ABM effort intact. The Soviets would throw in their SS-20's and some older INF weapons in order to get rid of the American Pershings and GLCM's in Europe: A good bargain, from their point of view. The Soviet leaders have or think they could soon have enough longer range weapons both to threaten Western Europe, Japan, China, and the Middle East and to paralyze the United States.
>
> In the light of that experience, it would be more practical and more convincing to delay the ratification of INF until the negotiations in Geneva on START and space questions run their course. The same end could be achieved through a reservation or amendment put forward by the Senate and accepted by the Soviet Union when instruments of ratifications are exchanged. If a sound arms control package is achieved, the INF Treaty in its present form would be acceptable as part of it, although in my opinion an agreement based on small equal quotas would be preferable. But more than 20 strenuous and disappointing years of nuclear arms negotiation should persuade us that we have no right to risk the security of the Nation until we have a firm and tangible basis for confidence that the Soviet Government under Mr. Gorbachev has indeed abandoned its policy of indefinite expansion backed by overwhelming military power. A nuclear arms agreement would be worse than useless if it turned out simply to legitimize conventional war, proxy war, terrorism, and subversion without fear of escalation to the nuclear level.

I have cited repeated examples of Soviet treaty violations. I believe that Soviets will cheat on this Treaty, just as they have cheated on every previous arms control treaty.

I think the Treaty is militarily significant. It is not in our security interest. And cheating on it, by the Soviets, will have dangerous consequences—both to the United States and our allies in Europe.

But even if Senators do not accept my assessment, other witnesses have agreed that the Soviet temptation to cheat on an INF Treaty grows if START is agreed upon. Let me cite the unclassified Intelligence Committee report, presented by Senators Boren and Cohen:

> The committee believes that in the absence of a START agreement, the Soviets have little or no incentive to cheat. With 10,000 warheads in their strategic arsenal today, the Soviets can cover INF and global targets and still have several thousand warheads in reserve.
>
> In an INF/START environment, however, the monitoring, cheating, and risk calculus changes substantially. The Soviet incentive to cheat could increase because of a greater difficulty in meeting targeting requirements. The military significance of any cheating will increase because of lower U.S. force levels.
>
> But the Soviets would have greater difficulty maintaining a covert force of intermediate-range ballistic missiles in a START regime with new limits on road-mobile strategic ballistic missiles and new provisions for short-notice inspections of undeclared facilities.
>
> The monitoring of numerical limits, rather than a ban, and of qualitative restrictions will make the satisfaction of collection requirements and, therefore, the detection of cheating far more difficult.

VI. POTENTIAL AMBIGUITIES AND LOOPHOLES IN THE INF TREATY

A. NO COMPLIANCE REGIME

Treaty Language

Article XIII provides for the establishment of the Special Verification Commission, which "if either Party so requests * * * shall meet within the framework of the Special Verification Commission to:

> (*a*) Resolve questions relating to compliance with the obligations assumed; and
>
> (*b*) Agree upon such measures as may be necessary to improve the viability and effectiveness of this Treaty.

The Treaty fails to provide for any specific sanction for noncompliance, and fails to provide any mechanism for the United States to redeploy INF missiles in Europe should a covert force of SS-20's be detected.

Issue

Should the Soviets violate the INF Treaty in a significant way, there is just about nothing the United States can do.

The United States could take its complaint to the Special Verification Commission. However, this Commission is much like the Standing Consultative Commission provided for in SALT I, which has proven entirely incapable of correcting Soviet violations to SALT I.

In accordance with Article XIII of the ABM Treaty, and Article VI of the SALT I Interim Agreement, the Standing Consultative Commission was established to deal with compliance problems.

However, the Commission has proven incapable of preventing or correcting the numerous Soviet violations of these treaties:

I. Presidentially Confirmed Soviet Violations of SALT I Interim Agreement

1. Soviet deployment of the heavy SS-19 ICBM and the medium SS-17 ICBM to replace the light SS-11 ICBM in violation of article II, which prohibited heavy ICBM's from replacing light ICBM's.
2. Soviet deployment of modern SLBM submarines exceeding the limit of 740 SLBM launchers, without dismantling other older ICBM or SLBM launchers.
3. Soviet camouflage, concealment, and deception deliberately impeding United States verification efforts.
4. Deployment of SS-N-21 and SS-NX-24 long-range cruise missiles on converted Y class SLBM submarines.
5. Use of former SS-7 ICBM facilities in support of the deployment and operation of the SS-25 mobile ICBM.

II. Presidentially Confirmed Soviet Violations of SALT I ABM Treaty

1. Construction of new large phases-array radar at Krasnoyarsk, the siting, orientation, and capabilities of which "directly violate" three provisions of the Treaty.
2. Moving of a "Flat Twin" ABM radar and a "Pawn Shop" van from a test range and initiating deployment at a location outside of an ABM deployment area or ABM test range.
3. Over 100 ABM-mode tests of Soviet SAM-5, SAM-10, and SAM-12 surface-to-air missiles and radars, which are considered "highly probable" violations of the Treaty.
4. Strong evidence that the Soviets may be developing and deploying a territorial, and especially a nationwide, ABM defense, violating the Treaty ban on developing even a *base* for a nationwide ABM defense.
5. Development of Mobile ABM-3 system in violation of the Treaty's prohibition on mobile ABM's.
6. Continuing development of mobile "Flat Twin" ABM radars from 1975 to the present in violation of Treaty's prohibition on developing and testing mobile ABM's.
7. Soviet ABM rapid reload capability for ABM launchers which is a possible violation of the Treaty.
8. Camouflage, concealment, and deception activity deliberately impeding U.S. verification efforts.
9. Falsification of the deactivation of ABM test-range launchers in violation of ABM Treaty dismantling procedures.
10. Rapid relocation of a "Flat Twin" ABM radar, without prior notification as required by the Treaty.

The Standing Consultative Commission's inability to deter, address or correct Soviet violations of SALT I was summed up by Secretary of Defense Casper Weinberger:

> The SCC has failed to resolve any significant compliance issues in the approximately 1,500 days that it has been in session over the past 13 years. A less productive forum for the resolution of disputes would be difficult to find. The SCC has become a diplomatic carpet under which Soviet violations have been continuously swept, an Orwellian memory hole into which our concerns have been dumped like yesterday's trash.

Might the Special Verification Commission provided for in the INF Treaty be fated for the same ineffectiveness as the Standing Consultative Commission? During hearings before the committee, members probed to discover any differences between these Commissions.

On the opening day of our hearings, Chairman Pell asked Secretary Shultz to explain the differences. In response, the Secretary indicated:

> We think it will be good to give this process some new life, and in the concept of this new commission, it is something that can be called by either party whenever it wishes to call it, that is, whenever there is something bothering you, you can have a meeting and the other side must come and so on, as distinct from the idea of a standing group that is just sort of there and develops its own routines.

> And we think perhaps that will mean that when a meeting is held, it appears to be something of special significance because a problem has been identified that calls the meeting into being, and therefore it will be a more vigorous effort, and we will not have somebody who is just appointed for that and that is that person's job.

In response to questioning from Senator Kassebaum on January 28, Ambassador Nitze appeared to concur that the main difference between the Commission appears to lie in the regularity with which the different commissions would meet:

> [T]he difference between the SCC, as it now exists, and what we have in mind with respect to the Special Verification Commission, is that the SCC is a body which meets from time to time * * * what was thought about here [with the SVC] was that you want together fast, and that, therefore, any time either side requests a meeting * * * you create it ad hoc when there is a request, and you would change the people who would go to it, depending upon the nature of the question which was to come before it.

One might ask "What exactly will this Special Verification Commission do in response to a Soviet treaty violation?" According to Secretary of State Shultz, in testimony before the Foreign Relations Committee:

> If we detect a suspicious activity, we will initiate an immediate meeting of the SVC. The Soviets cannot refuse. At the SVC, we will have the right to describe our concerns and require a response. The Soviets may be able to demonstrate that the activity in question was not a violation. The SVC will be the place to determine that.
>
> If our concerns are not resolved, we will call for corrective action. If the Soviets were to persist in violating the Treaty, we would have to react. There must be a penalty for cheating.

But, there is no penalty for cheating provided for in the article of the Treaty establishing the Special Verification Commission, nor in fact, anywhere else in the Treaty. All that is clear from the Treaty is that the Commission will meet if the United States requests a meeting. Once at such a meeting, the Soviets can fold their arms, listen to our complaint, and nod their heads.

And if the Soviets choose to just "nod their heads" as they have done when confronted with their numerous violations to previous arms control treaties, the United States will be left with two choices; forget about the violation or withdraw from the Treaty.

If the United States were to catch a major Soviet violation within the first 3 years, we could freeze our withdrawal of INF missiles from Europe; provided that the basing countries consent.

However, if the Soviets choose to violate—or reveal an ongoing violation such as a covert SS-20 force—after 3 years, all U.S. INF missiles will have been removed and destroyed.

There would be no meaningful response available to the United States in such a situation. The Europeans would never permit a redeployment. And even if by some chance, Western European nations did permit a redeployment of U.S. INF missiles (a prospect which is doubtful), the cost to the taxpayer of such a redeployment would certainly exceed the $10 billion it cost for the initial deployment.

Protecting the United States from Soviet Violations to the INF Treaty

As the treaty now stands, the Soviet Union has no disincentive to cheating on the INF Treaty. The Special Verification Commission is not structured, and will not be able, to enforce the Treaty.

And if Soviet cheating occurs after 3 years—when all United States INF missiles are destroyed and removed from Europe, it is entirely unlikely that the United States will be able to reproduce and redeploy INF missiles in Europe in response.

It has been hopefully suggested that the Soviets would not dare cheat on this Treaty for fear of world opinion. However, the Soviet Union has cheated and continues to cheat on arms control treaties in total disregard of "world opinion."

Rather, it is the responsibility of the Senate to assure that the Soviets have a true disincentive to violating the Treaty.

This can be done by assuring the Soviet Union that a major violation of the INF Treaty on its part would be responded to with a redeployment of U.S. INF missiles in Europe. To accomplish this, the Senate should approve the following amendment to the resolution of ratification:

> Insert before the period in the resolution consenting to ratification the following Treaty condition: "subject, however, to the condition that the President is not authorized to commence the second phase of eliminations, provided for in Article IV of the Treaty, unless and until U.S. basing countries have agreed to the re-deployment of U.S. intermediate-range missiles in the event of a U.S. withdrawal from the treaty in response to serious breach of obligation on the part of the Soviet Union."

B. RANGE

Treaty Language

Article II, paragraph 5 of the Treaty provides that an "intermediate-range" INF missile for the purpose of this treaty is one "having a range capability in excess of 1,000 kilometers but not in excess of 5,500 kilometers."

Article II, paragraph 6 of the Treaty provides that a "shorter-range" INF missile for the purpose of this Treaty is one "having a range capability equal to or in excess of 500 kilometers, but not in excess of 1,000 kilometers."

Article VII, paragraph 4 of the Treaty clarifies that "range capability" shall be determined by the maximum range to which a missile has been tested.

Issue

The stated purpose of the INF Treaty is to "eliminate a whole class of nuclear weapons." However, due to the manner in which the Treaty defines INF missiles, a loophole exists which will allow the Soviets to legally deploy new weapons which are essentially INF missiles.

During negotiations on the INF Treaty, the United States proposed that the upper limit for INF missiles be set at 5,500 kilometers. This—according to the Congressional Research Service—represents the shortest distance between the 48 contiguous United States and the Soviet Union. Thus, any missile capable of exceeding this range was arbitrarily determined by the negotiators to enter the "strategic" class.

During hearings conducted by the Armed Services Committee, the committee's chairman, Senator Nunn, pointed out a particular loophole whereby the Soviets could develop a missile and test it just over the 5,500-kilometer mark and exempt it from the Treaty despite the fact it was essentially an INF missile.

Specifically, he noted, and Ambassador Glitman confirmed, that under the terms of the Treaty "the Soviets could develop a new type of ground-launched ballistic missile, they could test it one time above 5,500 kilometers * * * and thereby exempt it from the INF Treaty." The Senator then pointed out how such a missile would continue to be exempt even if it were tested "25 times at the intermediate range, and then redeploy[ed] * * * right where the SS-20's have been removed."

As Senator Nunn has pointed out, under the terms of the Treaty, the Soviets can develop a missile capable of a range of just above 5,500 kilometers, call it a "strategic" missile, and exempt it from the Treaty.

Ambassador Glitman, appearing before the Armed Services Committee suggested that this is not a loophole because once a missile is tested beyond 5,500 kilometers "the political impact of that missile changes, because it is no longer a unique INF missile 'aimed' at Europe or Asia, but not at the United States."

While the negotiators of this particular Treaty might technically define a missile with a range just above 5,500 kilometers to be "strategic," in reality, such a missile would not be a "strategic" missile, it would be an "INF" missile.

This is because a missile capable of just over 5,500 kilometers, say 5,510 kilometers, would not be of use to the Soviets in any missile exchange with the United States. Such a missile—if deployed at the point in the Soviet Union closest to the contiguous United States—would be capable of destroying but a handful of acres in Maine. Such a missile—which the negotiators of this Treaty would call "strategic"—would be totally incapable of destroying U.S. ICBM sites or major U.S. cities.

If the Soviets were to deploy such a missile, it would clearly be understood to be an INF missile, by all involved; the Soviets, the Europeans, and Americans. Such a missile would have all of the "political impact" of the missiles which will be eliminated under this Treaty. And if the Soviets choose to produce enough of these missiles, such missiles would have all of the "military impact" of the missiles being eliminated under this Treaty.

Thus the failure to set an effective upper range limit on missiles covered by the Treaty enables the Soviets—while remaining in full compliance with the Treaty—to develop, test, and deploy missiles capable of completely nullifying the goals of the Treaty.

Fixing this Loophole

If the United States truly wishes this Treaty to eliminate INF missiles, then this loophole needs to be plugged. This may be accomplished by changing the Treaty's definition for INF missiles to assure that neither party may possesses missiles which are essentially intermediate range.

With this in mind, Senators may wish to consider amending the Treaty to increase the maximum range definition for INF missiles from 5,500 kilometers, which is the approximate distance between Leningrad and New York.

This definition clarification will not affect the U.S. ability to deploy any current or future ICBM's. But it will assure that the Soviet Union cannot subvert the goals of the Treaty without violating the Treaty.

C. IS THE INF BAN TRULY "GLOBAL"?

One of the most widely touted benefits of the INF Treaty, we were told proudly and repeatedly, is that it achieves a "global ban" on intermediate-range missiles. During his testimony on January 25, Secretary of State Shultz noted:

> While I was in Moscow [in April, 1987], Gorbachev and Shevardnadze said that an INF Treaty should include a zero outcome for shorter range missiles in Europe. I told them that any limits on shorter range missiles had to be global. These systems were highly mobile; it simply did not make sense to try to establish regional limits.
>
> After some discussion, Mr. Gorbachev accepted this point, and said he would be willing to accept global zero for shorter range missiles. * * *
>
> In July [1987], the Soviet Union said that it would accept global zero not just for shorter range missiles, but for intermediate-range missiles, as well.

However, during the course of committee hearings and markup, questions have arisen about exactly how "global" the ban is. For instance, two of the missiles covered by this Treaty are the SS-4 and SS-5. All such missiles are banned by the Treaty, and the United States is permitted to inspect SS-4 and SS-5 missiles sites in Eastern Europe and the Soviet Union.

However, in 1962, these missiles were deployed in Cuba. As a part of the resolution of the Cuban missile crisis in 1962, the Soviets promised the United States that we would have onsite verification of the removal of these missiles from Cuba. Later, however, Cuba objected, and we never were able to exercise the promised "onsite" verification. While the White House says that it has no evidence that missiles are in Cuba, it is also true, as Admiral Crowe testified before this committee, that we have no capability to detect missiles unloaded at night and hidden in Cuban caves.

Another missile banned by the Treaty is the SS-12. However, very recent newspaper reports suggest that the Soviets have provided SS-12 missiles to Iraq.

The Washington Post reported on March 28, 1988:

> According to [Western military] officials, Iraq apparently has begun launching Soviet-made SS–12's carrying 2,000-pound explosive warheads against [Tehran].
>
> * * * Iran has maintained a supply of SS–12 missiles in its arsenal for some time, Western officials said, and Soviet officials here have reported through diplomatic channels that they retain "political control" over Iraqi use of the SS–12. * * * ["Iraq Targets Bigger Missile On Tehran: More Powerful Warheads Raise the 'Terror' Factor," by Patrick E. Tyler, March 28, 1988, p. A17.]

Neither elimination of these missiles nor onsite inspection of SS–12 missile bases in Iraq is provided by the terms of the Treaty. Yet, if this report is true, it represents a serious breach of the "global" ban on intermediate and shorter range missiles covered by the Treaty. It also raises the question of whether the Soviets have transferred SS–12's or other missiles banned by the Treaty to other countries.

News reports have also focused on the deployment in the Middle East of another Soviet missile not covered by the Treaty, but which appears to fall within the definition of "shorter-range" missiles supposedly banned by the Treaty.

The Soviet SCUD–B missile is not covered by the Treaty because of the Soviet claim that its range is *below* the 500 kilometers (300 miles) minimum established by the Treaty.

The Washington Post reported on March 22, 1988:

> * * * The Iraqi SCUD–B missile packed with hundreds of pounds of explosives dived into the sprawling southern suburbs [of Tehran], exploding with a long double kaboom.
>
> * * * The force of the blast blew out all of the facing windows of the Soviet mission, according to sources, just days after Iranian students had marched on it to protest Soviet SCUD–B sales to Iraq.
>
> Both Iran and Iraq are believed to use the Soviet-supplied SCUD–B missile. Baghdad is close enough to the border that Iran has been able to use unmodified missiles to hit the Iraqi capital. But to reach Tehran, which is almost 300 miles from the Iraqi border, Iraq is believed to have modified the SCUD–B to increase its range. ["Damage by Iraqi Missiles Evident in Tehran: Shattered Windows, Pulverized Buildings Seen in Iran's Capital," by Patrick E. Tyler, March 22, 1988, p. A1.]

Ambassador Glitman stated that U.S. negotiators believed the SCUD–B was approximately 300 kilometers in range. For the SCUD–B's being used by Iraq against Iran, the modifications would require doubling the distance, but bringing it clearly within the range of missiles "globally" banned by the INF Treaty.

Whether the Iraqis have made any range "improvements" on the Soviet SCUD–B is largely speculative. Even if they did, it is certain that the Soviets either taught them how to do it or did it for them. Either way, Soviet SCUD–B's must be brought under the Treaty's terms because of the evidence that they are being used for ranges in excess of those permitted by the Treaty.

Certainly, the introduction of intermediate-range missiles in the Middle East is of understandable concern to Israel. Time magazine, in its issue of April 11, 1988, reports:

> * * * They [the Israelis] are more concerned about Soviet-built SCUD-B surface-to-surface missiles deployed by Syria and Iraq, weapons that have a range of up to 360 miles and can reach any part of Israel. ["Beijing Surprise: Missiles for the Saudis," April 11, 1988, p. 40.]

One other observation should be made about the emerging proliferation of INF range missiles in the Middle East. Recent press reports have focused on the sale of Chinese CSS-2 missiles of intermediate range to Saudi Arabia.

These reports provide concerns on two counts. First, the ability of countries to obtain INF missiles from countries other than the Soviet Union or the United States will, no doubt, cause concern to our allies about whether we will assist them with technology to meet this threat. This is one of the reasons, for instance, that the article XIV controversy is so important. We need to be certain that we will not be restricted from aiding our NATO and non-NATO allies, including Israel, with technology for countering the growth of hostile INF-range missiles, particularly in the Middle East.

Second, the news reports indicate that the shipments of Chinese missiles to Saudi Arabia occurred for 2 years before detection by U.S. intelligence. The Washington Post reported on March 29, 1988:

> Using a wide variety of carefully crafted ruses, Saudi Arabia successfully hid from U.S. intelligence agencies for more than 2 years its acquiring of Chinese ballistic missiles with a range of more than 1,000 miles, according to an informed diplomatic source.
>
> The fact that Saudi Arabia, which has such close military and security ties with the United States, was able to carry out this deception suggests a significant failure of U.S. intelligence. ["Saudis Hid Acquisition of Missiles: Deception Indicates Significant Failure of U.S. Intelligence," by David B. Ottaway, March 29, 1988, p. A1.]

It took U.S. intelligence 2 years to detect covert activity in a friendly country with thousands of miles of desert. This is hardly comforting corroboration of the many assurances received that the Soviets would be unable to hide a covert SS-20 force in the many forests of the Soviet Union without United States detection.

D. THE ICBM—FLIGHT TEST LOOPHOLE

Treaty Language

Article II, paragraph 5 of the Treaty provides that an "intermediate-range" INF missile for the purpose of this treaty is one "having a range capability in excess of 1,000 kilometers but not in excess of 5,500 kilometers."

Article II, paragraph 6 of the Treaty provides that a "shorter-range" INF missile for the purpose of this Treaty is one "having a range capability equal to or in excess of 500 kilometers, but not in excess of 1,000 kilometers."

Article VII, paragraph 4 of the Treaty clarifies that "range capability" shall be determined by the maximum range to which a missile has been tested.

Article VI, paragraph 1 prohibits the parties from flight testing any missile covered by the Treaty.

The Treaty fails to prohibit flight tests of noncovered missiles at any specific range—including INF ranges.

Issue

One of the stated purposes of the INF Treaty is to "reduce the nuclear threat to Europe." However, one of the biggest shortcomings of the Treaty is that it fails to accomplish this goal.

Specifically, the Treaty does not address ICBMs, which the Soviets can legally maintain and produce. These missiles can easily be aimed and used at the very same targets in Western Europe at which Soviet INF missiles are currently aimed.

In addition, under the terms of the Treaty, the Soviet Union will be able to test ICBM's at INF ranges as often as they like in order to gain confidence that these missiles can be used to fulfill the very same missions of the missiles being eliminated under the Treaty.

This Treaty does nothing whatsoever to reduce the nuclear threat to Europe:

> During our hearings, Dr. Eugene Rostow, former Director of the Arms Control and Disarmament Agency reported to the committee that "All the targets that could be covered by SS-20's can also be covered by Soviet ICBM forces * * * or by other newer weapon systems that are coming along."

During hearings of the Armed Services Committee, Chairman Nunn pointed out, and Ambassador Glitman confirmed:

> If the Soviet Union tomorrow morning decided they wanted to replace every one of those SS-20's, they could go out and test a new missile with a range of over 5,500 kilometers. Then they could convert that into essentially, by the testing program, an intermediate missile. They could take them and put them in the same holes or different holes, and then they still would be within the Treaty.

However, the Treaty does more than simply fail to reduce the Soviet's ability to deploy missiles capable of use at INF ranges. The Treaty actually permits the Soviets to transfer nuclear warheads from the old INF missiles being eliminated to brand new ICBM's capable of hitting all of the same targets as the eliminated missiles.

Paragraph 3 of section 2 of the Elimination Protocol—which outlines the procedures for destruction of missiles—provides that "Prior to a missile's arrival at the elimination facility, *its nuclear warhead device and guidance elements may be removed.*" (Emphasis added.)

The Soviets can take these warheads, and according to testimony received before the Foreign Relations Committee, "simply bolt [them] on an alternative * * *" (Former Secretary of Defense James Schlesinger). The alternative, of course, can easily be new ICBM's capable of hitting targets in Europe; as well as in the United States.

Fixing this Loophole

The Treaty fails to reduce the nuclear threat to Western Europe—at the same time the United States will be required to eliminate its most effective deterrent to this threat (the Pershing II).

It is clear that arms control agreements above and beyond the INF Treaty would be necessary to accomplish the goal of reducing the nuclear threat to Europe. As Senator Nunn asked during hearings before the Armed Services Committee:

> Does this not lead us to the conclusion, though, that in order for this Treaty to really be militarily effective * * * it is almost essential that there be a follow-on strategic arms treaty in order to catch the category [of missiles] that could be used as a subterfuge, [namely] the ICBM's?

Some supporters of the Treaty recognize the seriousness of the question raised by Senator Nunn, but suggest that this shortcoming in the INF Treaty will shortly be addressed in the upcoming START agreement limiting ICBM's.

However, it is dangerous for the United States to ratify an arms treaty knowing it won't fulfill its purposes without agreement on future agreements. As Dr. Eugene Rostow, testified before the Foreign Relations Committee:

> The effort to ratify the INF Treaty before we are assured of sound agreements on the other elements in the nuclear equation violates the most basic principle of nuclear force analysis; namely, that the politico-military effects of particular nuclear forces can be evaluated only in the context of the Soviet-American nuclear balance as a whole. * * *
>
> From the point of view of negotiating tactics, ratifying INF now would be a serious mistake. Once we ratify an INF agreement, agreement on START and on defensive systems would become urgent for us. We should then be under great pressure to make concessions in order to get a START agreement and to reach an agreed position on defensive systems.

As Dr. Rostow pointed out, the danger of ratifying the INF Treaty without START goes beyond the failure of this Treaty to reduce the nuclear threat to Europe; it goes to the very heart of American security.

Dr. Rostow has proposed that "[a]s a matter of our national security, the United States should ratify only a comprehensive agreement, stabilizing the Soviet-American nuclear balance as a whole."

While Senators will have to look long and hard at any START agreement to determine whether it is in the security interest of the United States, Dr. Rostow does have a good point. To prevent the dangers he has identified, the Senate should condition the exchange of the articles of ratification until the Senate has considered and ratified START.

If the Senate refuses to view arms control in a comprehensive fashion, then at the very least, we should plug the loophole which enables the Soviet Union to gain confidence in the use of its ICBM's at intermediate range.

Specifically, article VI of the Treaty should be amended to prohibit flight tests of any ground-based missiles at intermediate ranges as such ranges are defined by the Treaty.

It is true that this amendment would not prohibit the Soviets from targeting their ICBM's at intermediate-range targets. However, without flight tests at this range, the Soviets would gradually lose confidence that their ICBM's can be used at this range with sufficient accuracy.

E. THE CONTINUOUS INSPECTION PROVISIONS FAIL TO DETER SOVIET PRODUCTION OF PROHIBITED MISSILES

Treaty Language

Article XI, paragraph 6 of the Treaty provides each party with the right—for 13 years after entry into force—to continuously monitor the portal (but not the interior) of a missile production facility of the other party. Under this article, the United States will continuously monitor the SS–25 final assembly plant at Votkinsk.

Article XI, paragraph 6, also provides, however, that if neither party conducts the process of final assembly for a period of 12 consecutive months, then neither party shall have the right to monitor the production facility of the other party, unless the process of final assembly is reinitiated of 5,500 kilometers."

Issue

In attempting to justify the INF Treaty, some witnesses before the committee proclaimed that the Treaty provides for "historic onsite verification."

But just because such verification is "historic" does not necessarily make it sufficient to deter or detect Soviet cheating. One such example lies in the provisions providing for continuous inspection of the Votkinsk assembly plant.

Ambassador Nitze shared with the committee his understanding of this provision:

> Inspection by means of continuous portal monitoring, for up to 13 years after the Treaty enters into force, of any ground-launched ballistic missile final assembly facility at which missiles with stages outwardly similar to stages of a treaty-limited missile are assembled. Under this provision, the United States is permitted to monitor the Soviet SS–25 final assembly plant at Votkinsk. Our inspectors will monitor all SS–25 ICBM's that exit the Votkinsk facility and will have the right to use various types of sensors to confirm that no INF missiles or missile stages are leaving the plant disguised as SS–25's.

However, the Ambassador's statement is somewhat misleading.

Our inspectors will not "monitor the plant", but rather will watch the door. There is no provision whatsoever for our inspectors to look inside to see if prohibited missiles are being assembled and stored.

Our inspectors will not "monitor all ICBM's that exit the plant," rather they will permitted to monitor canisters, of which only eight may be opened a year.

And even with the opportunity to randomly open eight canisters a year, this is no guarantee that INF missiles will not be "leaving the plant disguised as SS–25's." Rather, the Soviets can easily produce a two-stage SS–25 which has the same capabilities as the INF missile being destroyed under the Treaty.

Under section 9, paragraph 4 of the protocol on Inspection, our rights to monitor the Votkinsk plant is limited to "establish continuous monitoring systems at the [specified] portal * * * and appropriate sensors at the [specified] exits."

No provision is made whatsoever for monitoring activity inside of the assembly plant. If the Soviets chose to, they could assemble

INF missiles and store them inside of the plant, and we would never know it.

How, one might ask, would the Soviets then get these missiles out of the plant?

Under article XI, paragraph 6 of the Treaty, they could have our inspectors removed by simply ceasing the assembly operations at the plant for 12 months.

Or, the Soviets could wait until our inspectors had exhausted their annual allotment of eight canister openings, and then send these INF missiles out in ICBM canisters. Without looking into the canister, there is no way of determining whether what is inside is an ICBM or a prohibited INF missile.

Or, the Soviets could simply randomly send these INF missiles out in ICBM canisters, hoping that our eight random canister checks will not reveal these missiles. If such a missile is caught, the Soviets could claim it is an SS-25 which will have its last stage added in the field. And even if we insist that such a missile is a treaty violation, our State Department's historical indifference to compliance problems suggests nothing will be done in response anyway.

If, by chance, the Soviets are concerned about our inspectors' rights to randomly check eight canisters annually, a method exists by which the Soviets can camouflage INF missiles in the form of a two-stage SS-25, and thus avoid detection.

Dr. Fred Eimer, Deputy Administrator for Verification at the Arms Control and disarmament Agency testified before the Senate Foreign Relations Committee that the INF Treaty would permit the Soviets to take a two-stage SS-25 out of the portals of the Votkinsk assembly plant.

Even if our inspectors caught a two-stage SS-25 in the course of the eight random checks, the inspector would have no choice but to let such a missile pass. His rights are limited to stopping SS-20's.

However, such a two-stage SS-25 could serve the same purposes as an SS-20. As Dr. Eimer testified, the Soviets, in the field (and outside of the view of inspectors), could rebolt an existing SS-20 postboost vehicle, including warheads, on to this two-stage SS-25—with only minor adjustments.

This two-stage SS-25, could, if the Soviets so chose, have similar ranges as the SS-20. In fact, the Soviets could choose to test-fly the missile just once at 5,501 kilometers, and it would become legal under the Treaty. Either way, the Soviets would have, in effect, a modernized SS-20 fleet, using the same warheads, but with updated delivery vehicles.

Making the Votkinsk Inspection More Effective

The fact that the Soviets can produce a new two-stage 33-25 at Votkinsk, test it just once over 5,500 kilometers, and exempt it from the Treaty, can only be stopped by correcting the range definitions provided for in the Treaty.

However, the provisions providing for the Votkinsk inspections can be improved to provide us with confidence that production of SS-20's will not continue, and that SS-20's are not being stored inside of the plant.

In order to provide this confidence; the Senate should consider the following amendments to the Treaty: Providing for inspections inside of Votkinsk; or greatly increasing the number of random inspections of canisters leaving the plant; or eliminating the provision ending our monitoring of Votkinsk if the Soviets cease production for 12 months.

F. "DOUBLE NEGATIVE" IN ARTICLE VI

Article VI, paragraph 2 of the Treaty provides:

> Notwithstanding paragraph 1 of this article, each party shall have the right to produce a type of GLBM not limited by this Treaty which uses a stage which is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range GLBM having more than one stage, providing that that party does *not* produce any other stage which is outwardly similar to, *but not* interchangeable with, any other stage of an existing type of intermediate-range GLBM. [Emphasis added.]

The potential problems associated with the drafting of this provision are significant—especially since it deals with one of the core issues at stake in the INF Treaty, SS-20 missile stages. Perhaps the most succinct explanation of the problem was provided by the Armed Services Committee report:

> During the [Armed Services] Committee hearings, concern was raised as to whether this provision contains a double negative which would permit the Soviets to produce an ICBM that had one stage which is outwardly similar to, but not interchangeable with, a stage of the SS-20 and *another* stage that was outwardly similar to *and interchangeable* with another stage of the SS-20. Since a stage that was outwardly similar to and interchangeable with an SS-20 stage would for all intents and purposes *be* an SS-20 stage, the issue is whether the prefatory language in this provision (which reads "[n]otwithstanding paragraph 1 of this Article") in combination with the drafting error would allow the Soviets to retain SS-20 stages despite the provisions in the Treaty requiring their complete elimination." [Emphasis in the original.]

While on the one hand, this ambiguity may appear to be a semantic technicality, because of its centrality to the purpose of the Treaty, it could be a potentially dangerous flaw in the Treaty.

The concern is that the provision would not only provide for a first SS-25 stage that is outwardly similar to, but not interchangeable with, the first stage of the SS-20, but also would permit a second stage of the SS-25 that could be outwardly similar to and interchangeable with the second stage of the SS-20.

The United States has accepted the Soviets' word that the first stage of the SS-20 is merely outwardly similar to, but not interchangeable with a SS-25 stage. In fact, it may already be both outwardly similar to and interchangeable with the first stage of the SS-25.

The double negative of article VI, paragraph 2 regards the second stage of the SS-25 which could be both outwardly similar to, and interchangeable with, the second stage of the SS-20.

Thus, it is possible that the Treaty would be meaningless in restricting the Soviets. This would be the case if the Treaty permits two outwardly similar stages—the first of which the Soviets claim not to be interchangeable with the SS-20 (but which, in fact, might be) and a second which by language of the Treaty can be, in fact, interchangeable with the second stage of the SS-20.

The Senate has been assured by the negotiators that the Soviets may produce one, but only one, stage which is outwardly similar to, but not interchangeable with, its SS-20 missiles. Further, the negotiators insist this is the history of the negotiating record, and an interpretation on which the Soviets agree.

However, because this issue involves actual Treaty language that appears to be at odds with both American and Soviet understandings of the provision, the Treaty text itself should be corrected to reflect both parties' stated intent. Similarly, because both parties allegedly agree on what was intended, it should prove to be one of the easiest flaws to correct. The administration's refusal thus far to sanction an amendment to the Treaty, even for the purpose of correcting this obvious drafting mistake, demonstrates the height of absurdity.

Former Defense Assistant Secretary Richard Perle suggested the following revision of the last clause of paragraph 2 to correct this error:

> * * * provided that that Party does not produce any other stage which is *either* outwardly similar to *or* interchangeable with, any other stage of an existing type of intermediate-range GLBM.

Rhetorical assurances from the Soviets that they will not exploit this drafting error are insufficient, and should not be accepted by the Senate. The Treaty text itself should be clarified to reflect the agreement. In the event that the Treaty were approved without addressing this issue, we may find that the Soviets attempt to exploit the language in the future—with dangerous ramifications for NATO. We certainly have enough examples already where the Soviets have reneged on their "clarifications," "understanding," ambiguous Treaty language, as well as perfectly clear provisons of arms control treaties.

G. ARTICLE XIV AND COOPERATION WITH U.S. ALLIES

Treaty Language

Article XIV of the Treaty provides:

> The Parties shall comply with this Treaty and shall not assume any international obligations or undertakings which would conflict with its provisions.

Further the article-by-article analysis of article XIV states:

> Article XIV records the Parties' undertaking to comply with the Treaty and not to assume any international obligations or undertakings that would conflict with the provisions of the Treaty. This provision thus reflects the duty of each Party under customary international law to comply with the Treaty (i.e. *pacta sunt servanda*). This provision refers only to the assumption of obligations in the future, and existing agreements are therefore unaffected. Article XIV will not affect existing

patterns of defense collaboration or cooperation with our Allies. Nor will this provision preclude cooperation with our Allies in modernization.

Issue

Will this provision allow the Soviets to contend, by way of interpretation, that the United States' ability for weapons development, weapons modernization, and shared technology with our allies will be restricted?

Administration witnesses before the committee stressed that the United States had prevailed against the Soviets in achieving a provision more limited than that sought by the Soviets. However, the inclusion of *any* provision stating that the parties intend to comply with the provisions of the Treaty is unnecessary. As noted in the article-by-article analysis, the concept of compliance is a reflection of customary international law. But if this is all that is intended, why is this particular concept singled out to be made explicit in the Treaty when other concepts of customary international law are not? What should be clear from the Soviets' persistence in demanding language of this nature is that they intend some additional obligation *beyond* that assumed under international law. Thus, the inclusion of such an article represents a significant failure by our negotiators.

The Soviets' ulterior motives were clear all the way through the final hours before the Treaty was signed, as they even tried to substitute a Russian-language translation that would have a more restrictive meaning than the English version.

Additionally, it has become clear since the Treaty was signed that the Soviets intend to use this provision of the Treaty as a basis for accusing the United States of violating the Treaty if we attempt the necessary modernization of NATO's remaining nuclear weapons in Europe.

The Soviet Foreign Minister, Mr. Shevardnadze, claimed, for instance, during a recent trip to West Germany that article XIV prohibited United States modernization of existing missile weaponry. Secretary Shultz has tried to focus attention on one Shevardnadze comment stating the opposite. Specifically, he cited to the committee the following statement by Shevardnadze before the Supreme Soviet on February 9:

> The Treaty itself does not give such a guarantee, but it creates good conditions to achieve progress and achieve the reduction of weapons in other fields, too.

However, Secretary Shultz also acknowledged that in the same February 9 statement, Shevardnadze also said of potential NATO modernization efforts:

> Such a course of events would be at variance with the emerging tendency toward reducing nuclear arms and decreasing the nuclear threat.

More recent Soviet statements have repeated Shevardnadze's initial contention that article XIV bans NATO's nuclear modernization efforts, and yet the Secretary failed to acknowledge these contradictory public statements during his March 14 testimony. These modernization efforts, sometimes described as measures to compensate for the removal of the Pershing II's, are crucial for NATO's continued viability. On February 19, 1988, the Soviets said during a Moscow television interview that article XIV prohibited the modernization plans of NATO. The following are excerpts from the broadcast, as translated in English by the U.S. Foreign Broadcast Information Service:

> * * * Will damage not be inflicted on the Treaty by the so-called compensation measures of NATO? Have each side's obligations not to undertake any actions which contradict the Treaty been reflected clearly enough in the Treaty, and in particular in article 14 of it?
>
> [The First Deputy Minister of Foreign Affairs Yu. M. Vorontsov]: In our view, all the plans which are presently being discussed in the United States and in certain Western European countries concerning compensation are indeed blasphemous plans. To try to compensate for this breakthrough with something else means trying to close the very important process which has begun, to turn it back.
>
> [Georgiy Markovich Korniyenko, chairman of the Preparatory Commission, the Working Body of the Foreign Affairs Commissions of the Chambers of the U.S.S.R. Supreme Soviet]: To sum this part up in a few words, the Treaty, both in letter—I am thinking of article 14—and in its overall spirit is, of course, an obstacle on the path of these plans. * * *

In TASS of the same date, the following was contained:

> Yes, the total destruction of intermediate-range and shorter range missiles undoubtedly scales down the danger of a nuclear war breaking out, parliamentarians said. But the question remains: Do NATO "compensatory" measures not damage the Treaty?
>
> Our experience of conducting Soviet-United States negotiations on disarmament confirms that it is essential to trust but also to verify. It is necessary that a definite barrier be put so that the commitments assumed by the United States are not violated by any actions outside the framework of this Treaty. Article 14 of the Treaty, which was initiated by the U.S.S.R., is just meant to give such guarantees.
>
> The Soviet side waged a heavy fight for the inclusion of this article in the Treaty up to the most recent days. What we observe in the West now around the issue of the so-called compensations only confirms our foresight of the need to include in the Treaty clear-cut guarantees which are contained in the aforementioned article, Yuliy Vorontsov noted.

These statements from the Soviets do not demonstrate a "common understanding" about the meaning or intent of article XIV. Our negotiators' reassurances are insufficient to corroborate the Soviets' stated public position on this issue. The fact that the negotiating history allegedly supports our negotiators' interpretation may prove difficult to prove in the years ahead. The history of the provision is further complicated by the preponderance of public statements from Soviet officials which, with the one exception pointed to by Secretary Shultz, indicate a very different interpretation at the same time the Senate is considering this and other aspects of the Treaty. The Senate must clarify explicitly that article

XIV does not in any way impose obligations on the United States that are not expressed elsewhere in the Treaty and thereby preserve very clearly our ability to share technology and information and to assist in nuclear modernization.

Solution

If article XIV means what the administration's article-by-article analysis says it means, there should be no problem adding this clarification to the text of the treaty—either by amendment or reservation. If the Soviets object to such a clarification, we certainly ought to find out now, rather than later.

H. ELIMINATION LAUNCHES

Treaty Language

Article X, paragraph 5 of the Treaty permits each party to eliminate through launches as many as 100 of its intermediate-range missiles during the first 6 months after the Treaty enters into force.

The hearings established that the Soviets pressed for this right to be included in the Treaty, claiming that they could not eliminate all of their missiles within the 3-year period provided in the Treaty.

Issue

Dr. William R. Van Cleaver, professor and director, Center for Defense Strategic Studies at Southwest Missouri State University questioned the Soviet claim that 3 years would not be sufficient time for the Soviets to destroy their missiles and pointed out some of the loopholes associated with this provision of the Treaty. Dr. Van Cleave also acknowledged that the Soviets could use elimination launches for reliability testing or troop training.

Witnesses also questioned whether the Soviets could use these elimination launches for flight tests, which are prohibited by the Treaty. Frank Gaffney, former Deputy Assistant Secretary of Defense, testified before the Armed Services Committee:

> In agreeing to the Soviet Union's demand that the accord permit them to dispose of at least 100 INF missiles by flying them to destruction, we have seriously compromised this feature of the INF accord.
>
> Indeed, we have offered the Soviets through this device an opportunity to design a de facto flight test program, so as to maximize their knowledge and confidence in any covertly stockpiled missiles.

Administration witnesses contest the idea that elimination launches could be used by the Soviets for flight test purposes by pointing to paragraph 4 of section II of the Protocol on Elimination which specifically states, "Neither Party shall transmit or recover data from missiles being eliminated by means of launching except for unencrypted data used for range safety purposes." The obvious question is whether compliance with this seemingly straightforward restriction can be verified? Dr. Van Cleave responded:

> It is one of several provisions that I see where I wonder the same thing: How could it be verified? There are several key

parts of this agreement that cannot be verified with confidence.

In essence, the provision may enable the Soviets to extend, by 6 months, its ability to test its SS-20 missiles. If Dr. Van Cleave is correct, as I believe he is, that there is no way to verify that the elimination launches are not being used for flight tests, the Soviets will be able to do this without detection by the United States. The ultimate purpose for this provision may well be that suggested by Mr. Gaffney—to maximize their knowledge and confidence in any covertly stockpiled missiles. Therefore, the danger in this particular provision is magnified based on the likelihood that the Soviets do, indeed, plan to maintain a covert force of SS-20's.

I. THE MISNOMER OF ELIMINATION

Treaty Language

Article IV, paragraph 1 and article V, paragraph 1 require the parties to eliminate all INF missiles, and launchers, support structures and equipment of such missiles.

Section 2, paragraph 10 of the Protocol on Elimination provides for the destruction of the Pershing II missile, the cutting in half of the Pershing II erector-launcher mechanism, and the cutting in half of the Pershing II launcher chassis.

Section 2, paragraph 10 of the Protocol on Elimination provides for the destruction of the SS-20 missile, the cutting in half of the erector-launcher, but the cutting of only 0.78 meter off the rear of the launcher chassis, and cutting of only 0.78 meter off the end of the missile transporter vehicle chassis.

Issue

A great inequity exists in the manner in which the United States and the Soviet Union are required to carry out "elimination procedures" on prohibited missiles.

The Protocol on Elimination requires the United States to cut the essential elements of its missile systems in half, while the protocol only requires the Soviet Union to modify some major elements of its missile systems. For example, the only "elimination" procedures required of the SS-20 launcher chassis and missile transporter vehicle chassis are the removal of 0.78 meter from the end of these items.

This inequity was pointed out by Frank J. Gaffney, Jr., former Deputy Assistant Secretary of Defense, during hearings of the Armed Services Committee:

> [T]he INF Treaty expressly requires the two sides to eliminate their missile launchers, yet the Treaty's details allow the Soviets to retain their entire mobile missile launcher inventory simply by modifying these systems.
>
> The Soviets, as I understand it, secured this right by claiming that they intended to use modified launchers to haul pipes around the U.S.S.R. They maintained that unless granted it, we would enjoy an unfair advantage insofar as we intended to use for other purposes the MAN tractors associated with the Pershing II and GLCM launchers.

In acceding to this Soviet demand, however, we took another major step away from the pristine environment envisioned by the zero option.

Instead of a situation in which evidence of the U.S.S.R. retaining a single SS-20 launcher, for example, would constitute grounds for charging the Soviets with a violation, we will now be faced under this provision with a far more daunting, if not impossible task.

We must prove that any of hundreds of launchers observed in the Soviet Union have not had their treaty-dictated reversed, or otherwise available to launch SS-20's.

Mr. Gaffney has pointed out another major loophole in this Treaty. If the Soviets do in fact have a covert SS-20 force—as our intelligence community suspects—the failure of the elimination procedures to require the destruction of key elements of the SS-20 launchers might well assist the Soviets in maintaining the launchers they need for this covert force.

Closing this Loophole

Mr. Gaffney not only exposed an important loophole in the Treaty, during his testimony before the Armed Services Committee, he also proposed a simple way to plug this loophole without jeopardizing the Treaty:

> [T]he Senate should insist upon a change in the Treaty's details. The Soviet Union should be required to eliminate its launchers in precisely the same way we are disposing of ours; i.e., by cutting them in half.
>
> It is inconceivable to me that such a stipulation, one both entirely consistent with the general obligation of the INF Treaty and designed to eliminate predictable difficulties in the future over Soviet compliance, would, as has been argued, result in the Treaty's rejection by the Soviet Union.

Mr. Gaffney has recommended a simple way for the Senate to assure that SS-20 missile launchers are indeed eliminated—as was originally envisioned in the "double zero" proposal. At the same time, his recommendation would also eliminate one likely point of contention between the parties in the future.

Mr. Gaffney has also keenly observed that this simple amendment would not cause the Soviet Union to reject the Treaty. The Treaty—which removes the greatest European threat to the Kremlin, while failing to reduce Soviet military capabilities in any significant fashion—is just too good of a deal for the Soviets to reject over this simple change.

VII. MAJOR LEGAL ISSUES

It is easy to ignore legal and constitutional requirements when they pose practical difficulties in obtaining a result desired by a majority. Yet the Senate and the Executive Department have an enduring responsibility to the American people not to ignore law for expediency in achieving perceived short-term benefits. As the distinguished Majority Leader has thus repeatedly stressed, neither this nor any other treaty should be rammed through the Senate in defiance of statutory or constitutional principle.

Senator Byrd expressed this view to the committee, as follows:

> If the Senate approves the ratification of a treaty, it ought to know what it is doing. It is no rubber stamp. It is the most serious, one of the most serious of all serious responsibilities on the Senate.

Therefore, before examining the specific legal and constitutional questions raised by the form of the proposed Treaty—indeed, raised by its omissions, drafting errors, and prolific ambiguities—the Senate should perhaps reflect on these concise words of the then-Chairman of the Senate Subcommittee on Separation of Powers, Sam Ervin:

> The history of liberty is the history of the limitation of governmental power, not the increase of it * * * Concentration of power always precedes the destruction of liberty.

Senator Ervin did not say but easily also could have added Milton's axiom that "necessity is the plea of every tyrant."

Accordingly, the Senate must not lightly discard for either convenience or claimed urgency its duty to correct the legal and constitutional defects of the present document sent to it by the President because, whether the proposed Treaty is beneficial or dangerous to the nation in its substance, it can serve little ultimate good in furthering our liberties if it tramples down the very legal norms of the free society whose interests it purports to advance.

As stated by Chief Justice Hugo L. Black writing for the Court in *Reid* v. *Covert*, 354 U.S. 1, 40 (1957):

> Ours is a government of divided authority based on the assumption that in division there is not only strength but freedom from tyranny.

The Senate should therefore resist the easy road—the path of least resistance—urged by an Executive Department which apparently seeks to supplant law with platitudes and should instead, whether giving the proposed Treaty its approval or not, make the Executive conform to law and to the Constitution. It should do so because, as Justice Louis Brandeis observed now almost seventy years ago:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of this inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. *Myers* v. *United States*, 272 U.S. 52, 293 (1920).

In a word, the Senate should not turn a blind eye to the legal and constitutional flaws of the proposed Treaty text, nor should it, in the words of the Majority Leader, "just roll over and play dead and place its full trust and confidence in this Administration or any other Administration," by shirking the necessary impediments of American law and constitutional procedures even though the Executive might view these as troublesome annoyances.

A. DISPOSITION OF PROPERTY BELONGING TO THE UNITED STATES

Article I of the proposed Treaty would have the United States undertake an international obligation to dispose of all its Pershing II and Ground Launched Cruise Missiles. The Pershing II's and GLCM's are property belonging to the United States. They were purchased pursuant to appropriations initiated in the House of Representatives and represent a taxpayer expense of about $7 billion in dollar values of the current fiscal year.

The Constitution provides in Article IV, Section 3, Clause 2 as follows:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

In accord with the rule of express mention, which has primary in the rules of Constitutional construction, that power, expressly granted to Congress, precludes any inferred grant elsewhere. This result in reinforced by the similar rule of construction that the specific governs the general. Hence, the specific congressional power to dispose of public property governs and limits the broader and more general treaty power. The congressional power over property is thus both exclusive and preeminent. It cannot be exercised by treaty or by any other means except under authority given by Congress *by statute.* (See in support of the principles outlined, for example, *Botany Worsted Mills* v. *United States,* 278 U.S. 282 at p. 289 (1929); *T.I.M.E.* v. *United States,* 359 U.S. 464, 471 (1959); *Swiss National Insurance Co.* v. *Miller,* 289 Fed. 570 at p. 574 (App. D.C. 1923); and *Buffin* v. *Chase National Bank,* 192 F. 2d 58, 61 (7 Cir. 1951).)

With respect to the elimination of American INF missiles, Congress has not given such statutory authority. Yet we are confident that specific authority is a required precondition to carrying out our principal obligations under the Treaty because not only is the Constitution precise in its terms but the evidence in American law and history is conclusive that Congress and *only* Congress can exercise the disposal power.

As Ronald Reagan on this exact subject testified to the Senate on September 8, 1977:

> I believe that careful examination of legal cases as well as historical precedent leads one to the inevitable conclusion that Congress does hold *exclusive* power.

And, more to the point, as the Supreme Court flatly declared in *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317, at page 326 (1942):

> Since the Constitution places the authority to dispose of public lands [property] *exclusively* in Congress, the executive powers to convey any interest in the lands [to dispose of government property] must be traced to congressional delegation of its authority. (Emphasis added.)

The problem therefore is this: how can the United States undertake by treaty an international obligation to destroy property belonging to the United States when only Congress can authorize the destruction?

Up until the time of the Panama Canal Treaties in 1978, this problem was not seen as excessively perplexing. All that was required was to insure that other nations contracting by treaty with our country were put on notice that our internal domestic law required congressional approval of any matter involving the disposal of "territory or other property belonging to the United States."

Hence, ironically but among countless other examples, the Panama Treaty of 1955, which by its Article V transferred to Panama certain U.S. Government property, contains at several points in the text of Article V of the following condition precedent:

> Subject to the enactment of appropriate authorizing legislation by the Congress of the United States, . . .

It is not clear whether the lawyers at the Department of State, faced with the Presidents unequivocal prior pronouncements on the subject, have now returned to the view held from 1787 through 1978 or whether, despite the President's personal denials, they assert still—as they did during the Panama Canal Treaty debate—that the President acting through the Treaty power can dispose of taxpayer property contrary to the explicit terms of the Constitution. What is clear is that the Treaty fails to state that the disposal of the Pershing II's and GLCM's must be subject to the enactment of authorizing legislation by the Congress.

As a result, the Soviet Union will not be on notice at international law that our principal obligations—the very heart and soul of the Treaty—are themselves subject to congressional approval. It follows that unless the Treaty is appropriately amended by the Senate, it would bind the United States to an international obligation that Congress might not elect to fulfill.

Administration witnesses before the committee—uneasy perhaps in light of the President's published testimony of 1977—did not seem to contend that the treaty power was itself a sufficient basis for scrapping taxpayer property. Likewise, neither did they attempt to state that the various surplus property statutes governing the disposal of military or other property granted pre-existing authority to tear up perfectly usable, modern missiles. Instead, they implied that the missiles could be lawfully disposed of through the inherent power of the President as Commander-in-Chief of the Armed Forces. In short they seem to assert that the Commander-in-Chief can ignore the Constitution.

From the dawn of American military history our men-at-arms have had ingrained by training, regulation, and at times courts-martial the absolute duty to safeguard government property entrusted to their use or possession. Even for their clothing, down the chin-straps for a helmet or a pair of socks, they must sign as recipient and are held accountable. With this stringent and repeatedly emphasized aspect of soldierly discipline, a new theory of inherent command power to scrap equipment will set a strange example for the millions of officers and soldiers who have been and are now charged incessantly with safe-guarding government property. It will deliver an unusual message indeed to an Amry Private presented with a "Statement of Charges" for a lost mess-kit stamped "Property of the United States."

Of course military equipment is inevitably expended: operational losses, combat losses, ammunition fired, truck tires punctured, a wristwatch misappropriated—these are the normal incidents of providing for any military establishment. But when Congress appropriates money for a tank, Congress rightfully expects the vehicle to be used for its intended purpose in war or training and provides for methods of lawfully recognizing its destruction through usage or of disposing of it when useless. What neither Congress nor the taxpayer expect is for the Commander-in-Chief to order the tank blown apart because, although not contemplated at the time the appropriation was voted, he really only wanted the tank so that he could convince another Commander-in-Chief to blow his tanks apart too.

It is safe to say that the Framers of the Constitution did not have in mind giving the President, as Commander-in-Chief, in the absence of overriding battlefield exigencies, power to order the willful destruction of usable and valuable military property. It is far more likely that they had in mind insuring against usurpations when they expressly empowered Congress alone to dispose of government property and, pursuant to Article I of the Constitution, when they took care that only Congress was authorized—

> To declare War, grant Letters of Marque and Reprisal and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repeal Invasions; and
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .

Against this Constitutional background, the Senate, or, if necessary the court, should recognize the identity between this new claim of military power and the very claims of Presidential military authority that the Framers so jealously and clearly sought to circumscribe and check.

Some may, of course, contend that, although there is no inherent power in the Commander-in-Chief, there is sufficient existing statutory authority either in the various surplus property statutes (see e.g. 50 U.S.C. 1521 (Supp. III 1985); 10 U.S.C. 2574; 10 U.S.C. 2572; and 10 U.S.C. 2577), in the "Federal Property and Administrative Services Act of 1949" (40 U.S.C. 471 *et seq.*), in the "Arms Export Control Act" (22 U.S.C. 2751 *et seq.*), or even perhaps in 10 U.S.C. 125 which affects and describes certain aspects of the functions of the Department of Defense.

However, the various surplus property statutes would require the untruthful declaration that the Pershing IIs and GLCMs are obsolete, excess, or surplus; and the "Arms Export Control Act" would require a transfer to another country. It is noteworthy that the Administration has properly chosen not to claim authority from those laws.

Administration testimony before the Committee also gave no indication of any interest to attempt to rely on the powers granted by Congress in Title 10. In that regard, the most pertinent provision, 10 U.S.C. 125(c), reads as follows:

> [T]he Secretary of Defense may assign or reassign the development and operational use of new weapons systems to one or more of the military departments or one or more of the armed forces. However, *notwithstanding any other provision of this title or any other law,* the Secretary of Defense shall not direct or approve a plan to initiate a substantial reduction or elimination of a major weapons system until the Secretary of Defense has reported all the pertinent details of the proposed action to the Congress of the United States while the Congress is in session. (Emphasis added.)

The Administration has apparently (and correctly) determined that this provision could not be said to have been intended as authority to satisfy treaty obligations involving the elimination of major weapons systems. Clearly, the purpose of the clause is not to authorize the elimination of major weapons systems, but rather, to limit existing authority under the surplus or excess property statutes or the Arms Export Control Act by requiring, in the case of major weapons systems, prior reporting to Congress.

In short, it *reduces* the authority elsewhere granted—hence, the clause: "notwithstanding any other provisions of this title or *and other law,* the Secretary . . . shall *not* . . ."

It would be the height of sophistry to suggest that this limitation of authority is actually an expansion of existing authority. Here again, the Administration msut be presumed to understand that a limitation on authority delegated by Congress to dispose of major weapon systems whose utility is declining in relation to cost of manning, maintenance, and operation can not imply a *grant* of authority to eliminate brand-new systems to meet an international commitment.

Hence, when the ABM Treaty was amended by its 1974 Protocol permitting only one ABM system location, many assumed that the United States would site its one allowed system at the National Capital—the Safeguard ABM System at Grand Forks, Montana, was eliminated *pursuant to a specific statutory enactment.*

Similarly, during the period of compliance with the limits of the unratified SALT II Treaty (under the theory that during its pendancy the United States was obligated to take no action to defeat its object or purpose), the aging ballistic missile submarines that were eliminated (conventiently keeping our forces below SALT II limits) were never categorically declared to be eliminated to meet SALT II limits but were instead simply eliminated as obsolete, which they may have been. The same cannot be said of our brand new Pershing II's and GLCM's.

These problems the Administration has seen fit to try avoid by its new claim of inherent military power to dispose of government property.

But if the military commander can unilaterally scrap taxpayer property in the complete absence of battelefield necessity or statutory authority, then the potential abuses are limitless. The Senate should, therefore, require the Executive Department to follow the Constitution and insist that the Treaty be amended at Article II, or at another appropriate point, to include language similar or identical to that previously quoted from the 1955 Treaty with Panama.

If the Senate should deem it inadvisable to amend Article I or any other part of the Treaty itself, then it is recommended that, in lieu of amendment, the Senator adopt, prior to any final vote on a resolution of consent to ratification, the following condition to such resolution:

> Subject to the condition that neither the President nor any agent of the President is authorized to sign or exchange instruments of ratification unless and until Congress shall have enacted legislation specifically authorizing the disposal of the United States property which would be required to be eliminated by the entry into force of the Treaty and its Protocols.

Or, if some should fear that this language might result in a delay in ratification, then the Senate could uphold the Constitution through a simple reservation, to wit:

> Subject to the inclusion in the instruments of ratification of the following clause: "Notwithstanding the objections undertaken by it under this Treaty, the United States will not dispose of any of its property pursuant to this Treaty unless and until the Congress of the United States shall have specifically authorized such disposition."

Cutting against their natural inclination to favor these proposals, some Senators may be under the impression that, in the case of *Edwards* v. *Carter,* 580 F. 2d 1055 (D.C. Cir. 1978) *Cert. den.,* 436 U.S. 907 (1978) the property disposal question was resolved by a court ruling that the power could also be exercised by treaty. If so, this belief is mistaken for several reasons.

First and foremost, in the case of the present Treaty—unlike that of the Panama Canal Treaty—the Administration *does not* claim that the treaty power is concurrent with Congressional power in matters of property disposal. Instead, it appears to claim an entirely new disposal power for the Commander-in-Chief acting alone. Hence, *Edwards* v. *Carter* is not on point.

Second, *Edwards* v. *Carter* is not dispositive in any event because a single holding of a lower court, while it may be law for a particular case or a particular jurisdiction, can never be considered a final or full resolution of a Constitutional question. This principle has been repeatedly affirmed even by the lower courts themselves. (See, for example, from the countless authorities that could be cited, *Newsweek* v. *U.S. Postal Service,* 663 F. 2d 1186 (2 Cir. 1981); *Adlen's Inc.* v. *Miller,* 610 F. 2d 538 (8 Cir. 1976); and *Gunther* v. *Washington County,* 623 F. 2d 1301 (9 Cir. 1979).)

Third, the opinion of the majority in *Carter* v. *Edwards* is so weak that it is practically nonexistent. The two judges who constituted the majority merely wrote *per curiam* without substantial analysis. The dissenting judge, conversely, wrote a lengthy and authoritative opinion which set forth his reasoning in compelling detail. The strength and persuasiveness of his dissent is perhaps the underlying reason why the Supreme Court elected to deny certiorari. This assumption is not unreasonable because if the Court had taken the case, there is little doubt that a majority would have felt forced to concur with the dissent and thereby impede the transfer of the Panama Canal Zone. Such an action would have had international and internal political repercussions presumably not pleasing for the Court to contemplate.

For the convenience of those Senators who may wish to examine the basis for this last conclusion, the *per curiam* majority judgment and the substantive dissent in *Edwards* v. *Carter* are reprinted in full at the end of this section.

Senators who may still have lingering doubts regarding the necessity of Congressional approval before any Pershings IIs or GLCMs lawfully can be destroyed are also encouraged to read the 85 page printed reported of the Subcommittee on Separation of Powers entitled "The Panama Canal Treaties and the Congressional Power to Dispose of United States Property" (95th Congress, 2d Session) together with the Subcommittee hearing record covering eleven sessions and the testimony of 30 witnesses. (The Subcommittee report is reprinted in Part 5 of the Hearing of this Committee.) Also valuable is the printed record of testimony received by the House Committee on Merchant Marine and Fisheries (95th Congress, 2d Session) entitled "Power of Congress to Dispose of U.S. Property."

The Senate should seek to make every effort to avoid unconstitutional procedures in giving up those elements of the NATO INF deterent which were purchased at great cost by the American taxpayer and which now belong to the American people.

The words of Alexander Hamilton, who is well known in our history as the great proponent of *expansive* presidential power, are particularly appropriate. They are found in his "Letters of Camillus," 6 A. Hamilton, Works 166 (Lodge ed. 1904):

> An agent cannot new model his own commission. A treaty cannot transfer the legislative power to the executive department.

And he could have added that a treaty cannot bring forth, as from the head of Zeus, some new inherent military authority neither previously contemplated nor dared to be claimed.

Finally, it is well settled that treaties, like statutes, can be declared unconstitutional and that *ultra vires* actions can be enjoined. As Raoul Berger, Professor Emeritus of Constitutional Law at Harvard Law School, testified (Hearings, Subcommittee on Separation of Powers, 95th Congress, 1st Session, November 3, 1977, in Part 3, at page 332):

Professor Berger. In my view any attempt of disposition without getting the concurence of the Congress, including the House, would be void.

Senator Hatch. That is a strong statement.

Professor Berger. If I am right, if there is no "concurrent jurisdiction" to dispose of property in the executive branch, if that power is exclusively in Congress, then the President oversteps his bounds. That is unconstitutional, and if it is inconstitutional, it is void.

B. TREATY INTERPRETATION

The Cranston/Biden condition, before its later modification, was presented on March 29, 1988, in committee markup in the following form:

> That this Treaty shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, section 2, clause 2) for the making of treaties:
>
> (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;
>
> (b) such common understanding is:
>
> (i) based on the text of the Treaty; and
>
> (ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;
>
> (c) the United States shall not agree to or adopt an interpretation different from the common understanding *without the approval of the Senate.* (Emphasis added.)

During that day, I proposed and the committee accepted two amendments which caused the condition to be modified to read as follows:

> That this Treaty shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (article II, section 2, clause 2) for the making of Treaties:
>
> (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;
>
> (b) such common understanding is:
>
> (i) based on the text of the Treaty; and
>
> (ii) reflected in the authoritive representations provided by the executive branch to the Senate and its committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;
>
> (c) the United States shall not agree to or adopt interpretation different from that common understanding *except pursuant to Senate advice and consent to a subse-*

> *quent treaty or protocol, or the enactment of a statute. This understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise officially conveyed to the other contracting Party.* (Emphasis added.)

The following day on March 30, 1988, the committee adopted the condition in substantially the form previously agreed except that the preamble included a provision that the conditon would be "binding upon the Executive." Explaining to the committee immediately prior to the vote that this new clause would indeed bind the President "just like any Senate resolution would bind him," with my support the committee adopted the proposal on a vote of 12 to 6.

I agreed with the modified Cranston/Biden condition because I believed then and I believe now that it is an accurate, albeit somewhat awkward, statement of constitutional law. Furthermore, I agree in a general sense with the majority views regarding the condition, but I regret to say, however, that I find their lengthy exposition on the subject is in some sense somewhat vague and in another claims far too much for the condition than it actually achieves or can achieve.

Throughout the 100th Congress, the Senate has expended enormous time and nergy and written copious volumes on this subject of treaty interpretation. Much of this might better have been left to the high school civics classes where it ought to have been learned.

Nonetheless, the fulminous debate of proper means for construing a treaty has at least helped in the reeducation of us all and brought some clarity to the symmetrical plan that the Framers established for the promulgation of Federal law under the Constitution. For my own use, for example, I asked the lawyers on the committee minority staff to prepare a straightforward statement of the relevant principles unencumbered by any political bias arising from this or that view of the meaning of the ABM Treaty or any other contentious document. They were directed as well, since I have the "misfortune" myself not to be a member of their profession, to "keep it simple" and not to have more information in footnotes than in basic declaratory sentences.

The result was reasonably satisfying, and the memorandum is therefore included at this point as an expression of what appears to be a correct and, for once, clear outline of the relevant considerations surrounding treaty interpretation. It follows:

—Treaties and Federal statutes are supreme law over State statutes and constitutions. They are *not* supreme law over the U.S. Constitution.

—Treaties under the American Constitution are therefore both domestic law and international law.

—The meaning of a treaty at international law is determined primarily from the text of the Treaty itself and, only in the case of ambiguity, from the negotiating record reflecting the intentions of the *contracting* states. Principles of contract interpretation apply when the meaning of a treaty at international law is in question.

—In terms of domestic law *(called municipal law in international jurisprudence)* in America, the meaning of a treaty is determined primarily by reference to its text and secondarily, in the case of ambiguity only, by reference to its *executive* history both in the Executive Department of Government and in the Senate acting in executive session. Once ratified, the treaty text and its executive history are locked into place much as a statute and its legislative history (including an overridden veto message) are locked into place when the statute becomes law either through the President's signature or passage notwithstanding his objections.

—In terms of domestic law, once the domestic meaning of a treaty is locked into place upon ratification its meaning cannot thereafter be changed "by reinterpretation." However, each of the three branches of the Federal Government is its own arbiter of what that meaning is to the extent of its own powers under the Constitution.

—Since the President is charged by the Constitution with seeing that the law—including treaty law—is faithfully executed, he is required as Chief Magistrate under municipal law to execute obligations in a treaty as he determines those obligations to have been at the time of ratification. If another branch of Government disagrees with his determination of those obligations, then it must rely on its own powers to enforce its will. In the case of the Senate, the only principal constitutional method for enforcing its will regarding the meaning of a treaty (when its view as a body is at variance with that of the President) is to act with the House of Representatives to pass a statute (presumably over the President's veto) which requires the President to abide by the meaning asserted by Congress.

—The Senate could also enforce its will regarding the meaning of an existing treaty by amending the existing treat through amendment of a subsequent proposed treaty with the same foreign sovereign and making its consent to ratification of the latter treaty contingent on the President securing the acceptance by the foreign sovereign of the amendment of the Senate as so propounded. This course of action would obviously require the President's acquiescence in seeking ratification of the latter treaty notwithstanding his objection to the interpretation of the prior treaty made express by the amendment of the Senate.

—In case of conflict between the meaning of a treaty in domestic law and its meaning in international law, the President is bound by the domestic meaning under municipal law which requires him to execute the treaty faithfully pursuant to its domestic meaning. However, in terms of international relations, he is not limited by a domestic interpretation and has far greater freedom of action because principles of international law (based on contract law) obtain. In American history, this fact has led to numerous illogical situations in which treaties have been "set aside" or "suspended" rather than nullified or voided. In such cases, the purpose has been to maintain the stance that domestic law is neither being ignored or violated.

—The President's greater freedom of action at international law arises because, in terms of international law, there are a variety of principles related to contract law which operate to change the obligations of the United States as a contracting party even though an affected treaty may be technically valid in all aspects in terms of American domestic law. These principles include changed circumstances (for example, a declaration of war with the other contracting state), impossibility of performance (e.g. the other contracting state ceases to exist, c.f. the Republic of South Vietnam), fraud in the inducement (for example, the provision of false data on which a treaty was presumed to be based), mistake (for example, lack of knowledge of a material fact like *arguendo* the ignorance of a secret treaty between the GDR and the FRG for their reunification), and, of course, material breach (for example, every bilateral treaty ever ratified by the United States and the Union of Soviet Socialist Republics).

—Also, at international law, change in conduct by one party which is accepted or acquiesced in by the other can vary the obligations of one or both. This last principle is the reason the administration will not confront Russia with her ABM violations in the Standing Consultation Commission since our acknowledgment of the violations without countervailing action would, through acquiescence, confirm the international legitimacy of the Russian actions.

—In short, it is essential that any attempt by the Senate to enun ciate the foregoing principles not be officially transmitted to the Russians because were this to occur principles of international law governing the United States under the Treaty might be deemed to be those of American municipal law and thereby tend to bind the United States to higher standards than those required by international law or observed in practice by other contracting states, particularly the Soviet Union.

—Moreover, the Senate should avoid any vague provision that a "reinterpretation" must be submitted to the Senate for approval. Unless a "reinterpretation" is in the form of a proposed Treaty amendment between the United States and another contracting sovereign; i.e., in effect a new treaty, this proposal would permit unicameral legislation which is prohibited by the Constitution. Since the Constitution is supreme over treaties (not to mention over precatory material merely incorporated in a resolution of ratification), any condition requiring "reinterpretation" submittal would in any event be a nullity because, in the repeated words of the Supreme Court, "if it is prohibited by the Constitution, then it is void." Such a condition would also contribute to the prevailing and growing lack of understanding in congressional staff of the fundamental principles of lawmaking envisaged by the Constitution.

—The Framers in Philadelphia in 1787 provided that law at the Federal level (excluding the Constitution itself) could be created by two and *only* two methods: statute and treaty. At the time of its creation, law (whether treaty or statute) can of course be made self-terminating or self-limiting in the sense that it can be subject to a "sunset" clause or a clause providing that it be deemed void upon the happening of a contingency or effective only upon the happening of a contingency. Nonetheless, it is still positive law until specifically repealed or abrogated.

- —Law, perforce, can be unmade or modified by only two methods: statute and treaty. Since the two forms of law are interchangeable with neither being supreme over the other, it follows that, when latter in time: (1) a statute can modify or void a treaty; (2) a statute can modify or void a statute; (3) a treaty can modify or void a statute; and (4) a treaty can modify or void a treaty. Accordingly, as much as the Senate or some Senators may wish it to be otherwise, without a constitutional amendment, the Senate can neither make nor modify law acting by itself.
- —In summary, so long as nothing on the subject of treaty interpretation is embodied by amendment in the treaty or the instruments of ratification *no law is made* and the President's acceptance of an unincorporated condition as "binding on the Executive" is at best a "gentlemans' agreement" reflecting a present intention to go alone with a view expressed by resolution as the prevailing opinion of the Senate. Even if such a condition were incorrectly deemed to have statutory weight, it would do far less than generally supposed because a statute can neither add to nor subtract from the Constitution.

In view of the principles in the foregoing memorandum, an argument could easily be made that the modified Cranston/Biden condition is mere surplusage and, if so, that it may as well be stricken from the proposed resolution consenting to ratification. I disagree because the condition does serve the purpose of clearing the air in an area of constitutional law which ought never to have been clouded by imprecise declarations of the State Department lawyers. I also give my full support to the condition and urge other Senators to do so as well, because there have already developed numerous controversies regarding the interpretation of the proposed INF Treaty. For example, the Treaty is being interpreted by the Department of State as prohibiting so-called future systems while the Department of Defense appears to assert that it does not and no one, George Shutz included, has the vaguest notion of what the Russians think of the subject beyond that they will choose at any given point to give the Treaty whatever interpretation best suits their political and military needs.

A final worrisome problem found in the majority view on treaty interpretation is that "authoritative testimony" when clarifying ambiquities, drafting errors, or omissions in the Treaty serves to obviate the need for the Senate to adopt clarifying amendments, reservations, understandings, or declarations. While this may be true insofar as regards those few aspects of the Treaty which have strictly domestic application in the United States, it is decidedly untrue with respect to the meaning of the international obligations undertaken.

Simply because the Executive and the Senate have a "common understanding" of an international obligation does not mean that the other contracting state has the same understanding *nor does it bind it.* The *only* method of *ensuring* that our *internal* "common understanding" extends to the other sovereign (unless it is patently clear in the Treaty text or on the face of the negotiating record) is to adopt amendments, reservations, understandings, or declarations (depending on the scope and nature of the problem to be corrected) and to secure the assent (for amendments and some understandings) or the acquiescence (for reservations and declarations) of the other sovereign by incorporation of such provision either in the Treaty text or in the ratification instruments exchanged.

The Senate should therefore avoid the temptation to forget that not just domestic law but an *international contract* as well is being forged during treatymaking and that "authoritative testimony" while good enough for domestic purposes is generally not sufficient to tie down the behavior of another nation, especially when that nation is the Soviet Union from which at best every sharp practice possible can be expected.

The Senate, therefore, cannot assume, as the majority view implies, that the "authoritative testimony" received by the Senate will serve as any means whatsoever to bind Russia and must take those steps necessary to ensure that there is a meeting of the minds of the *contracting parties* and not just of the minds of the Senate and the President.

C. THE QUESTIONABLE ESTABLISHMENT OF THE NEW AGENCY OF GOVERNMENT CALLED "THE ON-SITE INSPECTION AGENCY"

Within days of the signing of the proposed Treaty, the administration, using the Department of Defense as proponent Department, established by Executive order an entirely new agency of the Federal Government called the On-Site Inspection Agency. The statutory authority for this action is unclear and repeated efforts by the General Accounting Office to obtain copies of the relevant Executive order have been deflected or denied. As best as can be determined from press accounts, this wholly new agency of Government will be manned by personnel from the Department of Defense, the Department of State, the Central Intelligence Agency, and the Federal Bureau of Investigation.

Again, somewhat inconveniently for the administration, the Constitution grants exclusive power to Congress with respect to the creation of the inferior offices and agencies of the executive branch. The Constitution thus provides at its article I, section 8, that Congress shall have exclusive power—

> To make *all* Laws which shall be necessary and proper for carrying into Execution * * * *all other Powers* vested by this Constitution in the Government of the United States, *or in any Department or Office thereof*." (Emphasis added.)

And article II, section 2, clause 2, limits the power of the President to make appointments of Officers *not specified* in in the Constitution to only such cases wherein such offices—

> Shall be established by Law * * *

The same clause permits such congressionally created offices to be filled without Senate advice and consent *only* when—

> The Congress may vest the appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

First, the new multidepartmental On-Site Inspection Agency has not been specifically authorized by congressional enactment as required by article I, clause 8. Second, the Congress has not "established by law" the offices in the new agency as required by article

II, section 2, clause 2. And, third, Congress has not specified whether such offices if created, shall be filled by Presidential appointment subject to the advice and consent of the Senate, or whether such appointments shall vest "in the President alone, in the Courts of Law, or in the Head of Departments."

Cognizant of these oversights, it appears that the Department of Justice has determined it best to withdrawn from the new agency spending statutory resolution of the foregoing requirements which the undisclosed Executive order apparently seeks to override

Unless a completely satisfactory explanation is forthcoming (none has been given for more than 4 months), the Senate should require adherence to the Constitution and adopt the following condition to any resolution consenting to Treaty ratification:

> Provided, however, that neither the President nor any agent of the President is authorized to sign or exchange instruments of ratification unless and until the Congress shall have enacted appropriate authorizing legislation to establish, to provide for the carrying into execution of the duties of, to specify the offices of, and to provide the manner of appointment to the offices of an agency for conducting the on-site inspections contemplated by the Treaty.

Here, once more, this provision may be viewed as inconvenient but, in the absence of even a copy of the Executive order (perhaps in the guise of a national security decision memorandum) arrogating these constitutional functions, the Senate should insist on adherence to fundamental constitutional norms and adopt a condition similar in form to one here suggested.

D. APPARENT ILLEGAL FUNDING OF THE "ON-SITE INSPECTION AGENCY"

The Anti-Deficiency Act, 31 U.S.C. Section 1341(a)(1) and Section 1350, makes it a felony punishable by 2 years in prison or a fine of $5,000, or both, to cause appropriated funds to be expended for a purpose not intended by Congress.

Although again a veil of obfuscation has prevented full knowledge of the facts, it appears that, even though the proposed Treaty has not received Senate approval nor has Congress appropriated implementing funds, the Defense Nuclear Agency has "loaned" $1.5 million to the On-Site Inspection Agency which has itself been created by Executive fiat. In fact, on the day of film, this report, the Legislative Affairs section of the new agency was unable to report the amount already expended but advises that substantial funds have already been "borrowed."

It would strain credulity to claim that the functions of the Defense Nuclear Agency include transferring moneys appropriated to it to a wholly new agency which purports to exist to conduct onsite inspections of compliance with an unratified Treaty.

Since no reasonable man is likely to make such a claim, there may be probable cause to believe that a person or persons unknown have engaged in exactly that conduct which the Anti-Deficiency Act sought to prevent by making it criminal.

If, as is highly possible, funds were transferred, then the Senate has an obligation to see justice upheld and to prevent any crimes that may have been committed from being ignored or swept under the rug.

Unless the administration puts forth a fully satisfactory explanation, the Senate should discharge its obligation in this regard by adopting the following condition to the resolution consenting to ratification:

> Subject, however, to the condition that neither the President nor any agent of the President is authorized to sign or exchange instruments of ratification unless and until the President by message to the Senate has, without delegation, certified that no funds were or will be transferred or advanced by the Defense Nuclear Agency or any other entity of the Executive Department to any new agency for conducting onsite inspection pursuant to the Treaty prior to its approval by the Senate or, in the alternative, that in his judgment as Chief Magistrate any such transfer does not constitute grounds for probable cause to believe that a crime has been committed under the Anti-Deficiency Act or that, such probable cause existing, appropriate prosecution has been or will be initiated.

This condition may seem to some to be harsh—but in the absence of a more forthcoming explanation—the Senate is entitled to require Executive accountability when the Executive Department proceeds to act with apparent disregard for the law and even disdain for the Senate which, after all, has not yet even approved the Treaty much less concurred in any House appropriation for funding its obligations.

E. FAILURE TO PROTECT THE PREROGATIVES OF THE SENATE IN THE TREATYMAKING PROCESS

The INF agreement negotiated in Geneva, laid before the Senate and debated and acted upon by the Senater may become a completely different agreement once advice and consent has been given and the articles of ratification have been exchanged with the Soviets.

This unusual situation results from Treaty provisions which allow fundamental issues to be redressed and fundamental obligations to be altered by representatives of the President and of the Kremlin—without any Senate participation or approval whatsoever.

These representatives, no doubt, will present any such changes in the terms of the Treaty as merely "technical" in nature, when in fact there is nothing to stop them agreeing to changes which could render the alleged achievements of the Treaty nugatory and serve as a precedent undermining Senate prerogatives in the future.

Article II, section 2, clause 2 of the United States Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur * * *".

However, despite this provision of the U.S. Constitution, the U.S. Supreme Court has determined that certain ministerial international agreements made by the President—without Senate advice and consent—may be constitutionally valid. The Senate as final arbitor of its own constitutional powers is, of course, not strictly bound by even that determination.

It is, therefore, in the interest of the U.S. Senate, as an institution, and as a representative body, to protect its prerogatives in regards to the treatymaking process. It must do this to assure that agreements of major significance are not reached and implemented by the President—whichever President it might be—without Senate advice and consent.

Despite this imperative, there are a number of loopholes in the INF Treaty which can be used by the President to alter the obligations of the United States or the Soviet Union without seeking Senate advice and consent.

1. The Amendment Process

Article XVI provides that amendments to the Treaty agreed to by the parties shall enter into force in accordance with the constitutional procedures of each party.

However, since the Supreme Court has determined that certain international agreements made by the President may be constitutionally valid, it is entirely possible that amendments to the Treaty approved unilaterally by the President would be considered consistent with the "constitutional procedures" of the United States.

In order to avoid the possibility that amendments to the Treaty may be approved by the President without Senate participation, the Senate should clarify that "the constitutional procedures" of the United States, for the purpose of approving amendments to the INF Treaty entails advice and consent of the Senate.

2. Actions of the Special Verification Commission

Article XIII of the Treaty establishes the Special Verification Commission. This Commission is intended to meet—upon the request of either party—to resolve questions relating to compliance. In addition, the Treaty permits the parties to meet "within the framework" of the Commission to to "agree upon such measures as may be necessary to improve the viability and effectiveness of this Treaty."

The Treaty fails, however, to address how measures agreed upon which alter the obligations of the parties will become effective. Will such measures automatically take force? Or rather, will they have to be submitted to the parties for ratification as amendments to the Treaty. If such measures are submitted, will ratification entail submission to the Senate for advice and consent?

The Senate should take steps to assure that this ambiguity is not used to alter the obligations of the United States or the Soviet Union without Senate participation. Specifically, the Senate should insist on a clarification that any "measure" agreed upon by the Commission which alters the obligation of either party, be submitted to the Senate for advice and consent before entering into force.

3. Updates to Memorandum of Understanding

At the time the President submitted the INF Treaty to the Senate for advice and consent, he also submitted other documents which he regarded as "integral parts" of the Treaty: The memorandum of understanding, establishing the data base; the Protocol on Elimination governing the elimination of missile systems, and the Protocol on Inspection regarding the conduct of inspections, with an Annex to the Protocol on the privileges and immunities to be accorded inspectors and aircrew members.

The data base provided in the memorandum of understanding establishes the specific obligations of the parties in regards to how many missile systems must be destroyed. Under article IX of the Treaty, however, the parties have the right to change this data base—and thus their obligations under the Treaty.

Specifically, article IX provides that within 30 days after the Treaty enters into force, the parties shall update the data provided in all categories of data contained in the MOU. In addition, the article provides that within 30 days of each 6-month period each party shall update the data for all categories of data contained in the MOU.

This article effectively provides the Soviet Union the right to alter its obligations under the Treaty. The Soviets can tell us they have less INF missiles than they actually possess, and since there is no provision for the United States to approve data changes of the Soviet Union, they can do so unilaterally. Thus the Kremlin can change the number of missiles it intends to destroy (leaving unknown members of covert INF missiles), and there is nothing the Senate can do about it.

It is an affront to the prerogatives of the Senate to permit the alteration of the obligations of a party without Senate advice and consent, by submission of an appropriate protocol—especially when the obligations extent to the very essence of the Treaty.

In order to protect its prerogatives in this regard, it is essential for the Senate to clarify that any updates to the MOU which alter the obligations of the parties be submitted to the Senate for advice and consent in accordance with established and required constitutional practice, to wit: a signed protocol subject to consent to ratification.

Mickey EDWARDS, Member of Congress, Oklahoma, et al., Appellants,

v.

James Earl CARTER, President of the United States.

No. 78-1166.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 10, 1978.

Decided April 6, 1978.

Certiorari Denied May 15, 1978.
See 98 S.Ct. 2240.

As Amended May 18 and June 13, 1978.

Rehearing Denied June 1, 1978.

Members of the House of Representatives sought to block transfer of federal property to a foreign nation through a self-executing treaty without a vote of the House. The United States District Court for the District of Columbia, Barrington D. Parker, J., denied injunctive relief. On appeal, the Court of Appeals held that the property clause of the United States Constitution does not prohibit the transfer of United States property to foreign nations through self-executing treaties.

Affirmed.

MacKinnon, Circuit Judge, dissented and filed opinion.

1. United States ⇐58(1)

The property clause of the Constitution is not the exclusive method for disposing of federal property, and the United States is not prohibited from employing an alternative means constitutionally authorized. U.S.C.A.Const. art. 4, § 3, cl. 2.

2. Treaties ⇐12

United States ⇐58(1)

The property clause of the United States Constitution does not prohibit the transfer of United States property to foreign nations through self-executing treaties. U.S.C.A.Const. art. 2, § 2, cl. 2; art. 4, § 3, cl. 2.

On Motion for Injunction Pending Appeal, Motion for Summary Reversal, and Motion for Summary Affirmance (D.C. Civil 77-1733).

Robert E. Kopp, Atty., Dept. of Justice, Washington, D. C., with whom Steven I. Frank, and Brook Hedge, Attys., Dept. of Justice, Washington, D. C., were on the motion for summary affirmance, for appellee.

Daniel J. Popeo, Washington, D. C., with whom Joel D. Joseph and Paul D. Kamenar, Washington, D. C., were on the motion for an injunction pending appeal and the motion for summary reversal, for appellants.

Before FAHY, Senior Circuit Judge, and McGOWAN and MacKINNON, Circuit Judges.

Opinion PER CURIAM.

Dissenting opinion filed by MacKINNON, Circuit Judge.

PER CURIAM:

This is an appeal from the District Court's dismissal of a challenge to appellee's use of the treaty power to convey to the Republic of Panama United States properties, including the Panama Canal, located in the Panama Canal Zone.[1] Appellants, sixty members of the House of Representatives, sought a declaratory judgment that the exclusive means provided in the Constitution for disposal of United States property requires approval of both Houses of Congress, *see* Art. IV, § 3, cl. 2, and that therefore the Panama Canal Zone may not be returned to Panama through the Treaty process, which invests the treaty-making power in the President by and with the advice and consent of two-thirds of the Senators present, *see* Art. II, § 2, cl. 2. Appellee contends that the Constitution permits United States territory to be disposed of either through congressional legislation or through the treaty process, and that therefore the President's decision to proceed under the treaty power is constitutionally permissible.

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[1] Two treaties, signed by the chief executives of Panama and the United States, were presented to the Senate for ratification. The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal has now been ratified by the Senate, *see* note 2 *infra*. The Article conveying the Canal Zone properties to the Republic of Panama is contained in the Panama Canal Treaty:

PROPERTY TRANSFER AND ECONOMIC
PARTICIPATION BY THE
REPUBLIC OF PANAMA

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and free of liens and debts, except as the two Parties may otherwise agree.

The District Court did not reach the merits of this controversy; rather, it dismissed the complaint for lack of jurisdiction after concluding that appellants lacked standing because they had failed to demonstrate injury in fact from the President's invocation of the treaty process. A notice of appeal and a request for a preliminary injunction pending appeal were immediately filed with this court. Appellee has moved for summary affirmance of the District Court's judgment either on the jurisdictional ground stated by the District Court or on the merits of appellants' contention; appellants have moved for summary reversal. We have heard oral argument and have considered the case on an expedited basis.[2] For the reasons appearing below, we affirm the dismissal of the complaint, not on the jurisdictional ground relied on by the District Court but for failure to state a claim on which relief may be granted.

I

In addition to its argument on the merits, appellee has presented several substantial and complex challenges to the jurisdiction of the federal courts to adjudicate the merits of the constitutional question presented in this case. We refer not only to the contentions as to lack of standing, but also to the arguments that appellants' action is both premature and presents a nonjusticiable political question. Deciding only the jurisdictional issue before us could result in this court, or the Supreme Court, remanding the case for further proceedings either on the merits or on jurisdictional issues. Because the merits of this controversy present a pure question of law, with no

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2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of Panama.

(d) Upon termination of this Treaty, all real property and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal . . . .

[2] The Senate consented to The Neutrality Treaty on March 14, 1978. It is expected that the vote on the Panama Canal Treaty will occur in early April 1978.

need of a hearing for fact development, because these merits are so clearly against the parties asserting jurisdiction, and because the judgment appealed from was based on only one of several asserted grounds of lack of jurisdiction, we believe it is appropriate to proceed directly to the merits of this case. This conclusion is bolstered when the time constraints imposed by the immediacy of Senate action on the treaties are considered. *See Adams v. Vance*, 187 U.S.App.D.C. 41, at 45, n.7, 570 F.2d 950 at 954 n.7 (1978), and cases cited therein.

Consequently, the precise question we address is whether the constitutional delegation found in Art. IV, § 3, cl. 2 is exclusive so as to prohibit the disposition of United States property by self-executing treaty—*i. e.*, a treaty enacted in accordance with Art. II, § 2, cl. 2, which becomes effective without implementing legislation.

II

Article IV, § 3, cl. 2 of the Constitution states in its entirety:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Appellants contend that this clause gives Congress exclusive power to convey to foreign nations any property, such as the Panama Canal, owned by the United States.[3] We find such a construction to be at odds with the wording of this and similar grants of power to the Congress, and, most significantly, with the history of the constitutional debates.[4]

The grant of authority to Congress under the property clause states that "The Congress shall have Power . . . ," not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that "The Congress shall have Power . . ."

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[3] In addressing the merits, we assume without deciding that the Panama Canal Zone real property which would be conveyed by the Panama Canal Treaty is indeed property belonging to the United States. Appellee has not contended otherwise and neither party has briefed this issue.

[4] The Senate Foreign Relations Committee has thoroughly considered and rejected appellants' argument. That Committee reported the treaties with Panama to the full Senate by a 14 to 1 vote, and the one dissenting Senator did not dispute the power of the President, by and with the advice and consent of two-thirds of the Senate present, to transfer United States property. *See* Exec. Rept. No. 95–12 (95th Cong., 2d Sess., Feb. 3, 1978).

In addition to the American Law Institute's Restatement of Foreign Relations Law, *see infra*, other authorities in agreement with this conclusion include Professor Louis Henkin, *see* L. Henkin, Foreign Affairs and the Constitution 159–60 (1965); Dean Louis Pollak, *see* 124 Cong.Rec., No. 8, at 5729 (95th Cong., Jan. 30, 1978); Professor Covey Oliver, *see* Hearings Before the Committee on Foreign Relations, Part IV, at 95, 103, 112–13 (Jan. 19, 1978); and Professor John Norton Moore, *see id.* at 89, 93–94. The Attorney General and the State Department Legal Adviser have also issued opinions that the Panama Canal may be disposed of through self-executing treaty. *See* Opinion of the Attorney General to the Secretary of State, Aug. 11, 1977; Hearings Before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee, Part I, at 3–25 (July 29, 1977). Raoul Berger, in testimony before the Subcommittee on Separation of Powers of the Senate Judiciary Committee in the fall of 1977, expressed a contrary position. His thesis seems to be that the President and Senate cannot exercise under the treaty power any power granted to Congress, *see* Hearings Before the Subcommittee on Separation of Powers, (95th Cong. 1st Sess., Nov. 3, 1977). We agree with Professor Henkin that such a narrow view of the treaty power would, by "outlaw[ing] treaties on matters as to which Congress could legislate domestically," "virtually wipe out the treaty power." L. Henkin, *supra*, at 149.

We note that Professor Henkin's treatise leaves no doubt but that he is in agreement with our position. The passage quoted by the dissent, as is realized upon a careful reading of the passage itself (with its references to "unilateral" Presidential action and "executive order[s]"), concerns the limitations upon the President's power to dispose of property through unilateral executive action. *See* note 24 *infra*.

Many of the powers thereafter enumerated in § 8 involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. 1, § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to accomplish through legislation what may concurrently be accomplished through other means provided in the Constitution.

The American Law Institute's Restatement of Foreign Relations, directly addressing this issue, comes to the same conclusion we reach:

> The mere fact, however, that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.

ALI Restatement of Foreign Relations Law (2d), § 141, at 435 (1965). The section of the Restatement relied on by the dissent merely states that the treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power. (Rest.For.Rel. § 117).[5] Of course the correctness of this proposition as a matter of constitutional law is clear. *See Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); *Geoffroy v. Riggs*, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642 (1890); *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924), also relied on by the dissent. To urge, as does the dissent, that the transfer of the Canal Zone property by treaty offends this well-settled principle—that the treaty power can only be exercised in a manner which conforms to the Constitution—begs the very question to be decided, namely, whether Art. IV, § 3, cl. 2 places in the Congress the *exclusive* authority to dispose of United States property.[6]

There are certain grants of authority to Congress which are, by their very terms, exclusive. In these areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress. For instance, the Constitution expressly provides only one method—congressional enactment—for the appropriation of money:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Art. I, § 9, cl. 7. Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable. Similarly, the constitutional mandate that "all Bills for raising Revenue shall originate in the House of Representatives," Art. 1, § 7, cl. 1, appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.[7]

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[5] Similarly, § 118(1) of the Restatement lends no support to the dissent's position because it is not even relevant to the issue before us. That section, consistent with *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), indicates that the treaty power is broader than the power of Congress to enact legislation. The issue before us, on the other hand, is whether the treaty power extends to an area in which Congress, by virtue of Art. IV, § 3, cl. 2, does have power to enact legislation.

[6] It is important to understand the limited scope of this inquiry. If Art. IV, § 3, cl. 2 does in fact provide the exclusive means of property disposition, *i. e.*, by legislation, clearly a self-executing treaty would be a constitutionally impermissible alternative. As the dissent repeatedly indicates, the treaty power may not encroach on delegation made exclusively to Congress.

[7] The dissent argues that because the power to declare war is exclusively reserved to Congress by Art. 1, § 8, so also must be the power to dispose of United States property, which power is granted to Congress in the same language as the war-making power. *Cf.* L. Henkin, *supra*, at 160 n.**. The *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, may place it apart from the other congressional powers enumerated in Art. 1, § 8 and in Art. IV, § 3, cl. 2. The history, discussed *infra*, of

These particular grants of power to Congress operate to limit the treaty power because the language of these provisions clearly precludes any method of appropriating money or raising taxes other than through the enactment of laws by the full Congress. This is to be contrasted with the power-granting language in Art. 1, § 8, and in Art. IV, § 3, cl. 2. Rather than stating the particular matter of concern and providing that the enactment of a law is the only way for the federal government to take action regarding that matter, these provisions state simply that Congress shall have power to take action on the matters enumerated.

Thus it appears from the very language used in the property clause that this provision was not intended to preclude the availability of self-executing treaties as a means for disposing of United States property. The history of the drafting and ratification of that clause confirms this conclusion. The other clause in Art. IV, § 3 concerns the procedures for admission of new states into the Union, and the debates at the Constitutional Convention clearly demonstrate that the property clause was intended to delineate the role to be played by the central government in the disposition of Western lands which were potential new states. Several individual states had made territorial claims to portions of these lands; and as finally enacted the property clause, introduced in the midst of the Convention's consideration of the admission of new states, sought to preserve both federal claims and conflicting state claims to certain portions of the Western lands.[8]

The proceedings of the Virginia state ratifying convention provide further evidence of the limited scope of the property clause. During a debate in which the meaning of the clause was questioned, Mr. Grayson noted that the sole purpose for including this provision was to preserve the property rights of the states and the federal government to the Western territory as these rights existed during the Confederation.[9]

This history demonstrates the limited concerns giving rise to the inclusion of Article IV, § 3, cl. 2 in the Constitution. Whether or not this historical perspective might serve as a basis for restricting the scope of congressional power under the property clause, we view it as persuasive evidence for rejecting the claim that Article IV is an express limitation on the treaty power, foreclosing the availability of that process as a constitutionally permissible means of disposing of American interests in the Panama Canal Zone.

III

The debates over the treaty clause at the Constitutional Convention and state ratify-

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the constitutional convention and ratifying conventions with respect to the property clause and the treaty clause, on the other hand, clearly demonstrates the Framers' intention to allow disposition of the United States property through self-executing treaty. Moreover, while there are numerous instances in past treaty practice of the latter, we know of no instance in which the United States has been in a state of formally declared war without a congressional declaration thereof.

[8] The states' claims to unsettled Western (trans-Allegheny) regions were based on charters granted to them from Great Britain. Landless states argued that all Western lands should inure to the benefit of all states, *i. e.*, should be federal properties. *See* H. Hockett, The Constitutional History of the United States 1776–1826, 143–46 (1939); 2 M. Farrand, The Records of the Federal Convention of 1787, 461–66 (1937); 3 *id.* at 226–27.

[9] This issue arose in a debate over the treaty clause that was not unlike the controversy before this court. Governor Randolph of Virginia stated that he could "conceive that neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty." He then argued that Art. IV, § 3 must be intended to protect against the dismemberment of the Union. Mr. Grayson replied that

> [t]his clause was inserted for the purpose of enabling Congress to dispose of, and make all needful rules and regulations respecting, the territory, or other property, belonging to the United States, and to ascertain clearly that the claims of particular states, respecting territory should not be prejudiced by the alteration of the government, but be on the same footing as before; that it could not be construed to be a limitation on the power of making treaties.

3 Elliot's Debates in the Several State Conventions on the Adoption of the Federal Convention 504–05 (1907).

ing conventions even more directly demonstrate the Framers' intent to permit the disposition of United States property by treaty without House approval. As originally reported to the Convention, authority to make treaties would have been entrusted to a majority of the Senate, without even Presidential participation.[10] However, this structure was thought to entrust too much power to the Senate, and the provision was subsequently amended to include an active Presidential role. Nonetheless, concern over the extensive scope of the power remained; particularly worrisome was the potential use of treaties as a means of effecting territorial cessions. Elbridge Gerry expressed this fear when he noted that "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory, etc. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed than on any other occasion." [11]

Concern about the sweeping character of the treaty clause led to several proposed amendments aimed at limiting its exercise. One amendment would have restricted this power by requiring that "no Treaty of Peace affecting Territorial rights should be made without the concurrence of two thirds of the (members of the Senate present.)" [12] For some delegates, however, merely increasing the level of Senate approval did not go far enough towards ensuring the proper exercise of the treaty power. Thus Connecticut's Roger Sherman proposed an amendment providing that "no such [territorial] rights should be ceded without the sanction of the Legislature." [13]

The Committee of Eleven, in whose hands this issue finally rested, rejected the proposed amendment for House participation. Instead, a provision requiring a two-thirds Senate vote for the passage of all treaties was adopted. This choice clearly indicates the Framers' satisfaction was a supermajoritarian requirement in the Senate, rather than House approval, to serve as a check upon the improvident cession of United States territory.

That the two-thirds voting requirement did not affect the scope of the treaty power, but only made ratification of treaties more difficult, was clearly understood at the state ratifying conventions. An amendment proposed at the Virginia Convention provided that

> no treaty ceding, contracting, restraining, or suspending the territorial rights or claims of the United States . . . shall be made, but in case of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.[14]

This, and a similar amendment offered at the North Carolina Convention,[15] evidence the broad interpretation given Article II, § 2 at the time of its inception.[16] As was true of the effort at the Constitutional Convention to introduce House participation in ratification of treaties, these state attempts to limit the treaty power as now contained in the Constitution also failed.

That those who framed and ratified the Constitution rejected several express attempts to limit the treaty power in the

10. The account in the text is from 2 Farrand, *supra*, at 540–49.

11. *Id.* at 541.

12. *Id.* at 543.

13. 3 Elliot's Debates, *supra*, at 500.

14. *Id.* at 660.

15. *See* S. Crandall, Treaties, Their Making and Enforcement 63 (2d Ed.1916); 4 Elliot's Debates, *supra*, at 115.

16. James Madison stated that "I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right." But he continued by noting "I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation." 3 Elliot's Debates, *supra*, at 514. It appears, thus, that Madison was only formulating a well-recognized limitation on all of the constitutional powers, namely, that the exercise of constitutional delegations is restrained by the basic premises upon which the Union and the Constitution were created.

manner now urged by appellants greatly undermines the interpretation of that power they press upon us. From this evidence we conclude that the disposition of property pursuant to the treaty power and without the express approval of the House of Representatives was both contemplated and authorized by the makers of the Constitution.

IV

In view of the lack of ambiguity as to the intended effects of the treaty and property clauses, it may be surprising that judicial pronouncements over the past two centuries relating to these constitutional provisions are somewhat vague and conflicting. However, none of the actual holdings in these cases addressed the precise issue before us—whether the property clause prohibits the transfer of United States property to foreign nations through self-executing treaties. While, therefore, neither the holdings nor the dicta of these previous cases are dispositive of the case before us, we believe that in the main they support the conclusions we have stated heretofore.

One line of cases, involving the property clause, has arisen in the context of the division of power between the federal government and the states. In discussing this question, the Supreme Court has stated that Article IV "implies an exclusion of all other authority over [United States] property which could interfere with this right or obstruct its exercise."[17] We think that the most reasonable interpretation of such dicta, occurring in the context referred to, is that there is a lack of any constitutional basis for exercise of authority by individual states over United States property.[18] But that a specific congressional power is exclusive against intrusion by the states does not necessarily remove it from the sphere of the federal treaty power.

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[17] *Wisconsin Cent. R.R. Co. v. Price County,* 133 U.S. 496, 504, 10 S.Ct. 341, 344, 33 L.Ed. 687 (1890).

[18] The dissent also relies upon *Alabama v. Texas,* 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689 (1954), which upheld the Submerged Lands Act of 1953, 67 Stat. 29. The reference in that case to Congress' power to dispose of property "without limitation" had no application to whatever limitation on Congress' power may be thought to result from use of the treaty power to accomplish disposal of property. Rather, the salient question in the case was whether Congress could grant to individual states indefeasible title to and ownership of certain resources under submerged marginal ocean lands. Thus, it appears that in referring to Congress' power "without limitation", the Court was holding that Congress' authority under Art. IV, § 3, cl. 2 embraces any disposition of property of the United States chosen by Congress. *See also Inter-Island Co. v. Hawaii,* 305 U.S. 306, 59 S.Ct. 202, 83 L.Ed. 189 (1938) (Under the Art. IV, § 3 powers to regulate, Congress has the authority to permit the Territory of Hawaii to impose taxes on petitioner's interstate business operations); *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909) (Congress has power to retain federal jurisdiction over crimes committed by an Indian allottee on allotted land of an Indian reservation within the confines of a state); *Wisconsin Cent. R.R. Co. v. Price County,* 133 U.S. 496, 10 S.Ct. 341, 33 L.Ed. 687 (1890) (United States property is not subject to state taxation since enforcement of such a tax might result in states, instead of Congress, controlling the disposition of federal property contrary to Art. IV, § 3, cl. 2); *Griffin v. United States,* 168 F.2d 457 (8th Cir. 1948) (county resolution declaring federally owned property open for grazing is invalid encroachment upon power delegated to Congress to regulate United States property).

Appellants also cite several cases that, while not dealing with federal-state relations, are nonetheless inapplicable here. *See United States v. Fitzgerald,* 40 U.S. (15 Pet.) 407, 10 L.Ed. 785 (1841) (an individual employee of the federal government is not empowered by his position to dispose of federal property without further congressional authorization); *United States v. Gratiot,* 39 U.S. (14 Pet.) 526, 10 L.Ed. 573 (1840) (congressional authorization to lease publicly owned lead mines to individuals is within constitutional delegation permitting "disposal" of United States property); *Sierra Club v. Hickel,* 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom., Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (Congress had the power to delegate regulation of the public lands to Executive officers).

In *Sioux Tribe v. United States,* 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), cited by appellants, the Court held that the President could not by *Executive Order* dispose of public lands without congressional authorization. However, the unilateral nature of Presidential action by Executive Order renders that case inapposite here. Treaties involve not only Presidential action but senatorial participation as well.

Another line of cases, involving the treaty clause, has arisen in the context of conveyances by the federal government to Indian tribes. The leading case on the power to convey such land by self-executing treaty is *Holden v. Joy,* 84 U.S. 211, 21 L.Ed. 523 (1872). In quieting adverse claims to certain lands west of the Mississippi which had previously been conveyed to the Cherokee nation by treaty, the Court had to determine the validity of the original grant to the Indians. The Court noted that

> still it is insisted that the President and Senate, in concluding [a treaty for the transfer of property], could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress. . . . On the contrary, there are many authorities where it is held that a treaty may convey to a grantee good title to such lands without an act of Congress conferring it. . . .

Id. at 247. Because later congressional enactments repeatedly recognized the validity of the transfer, the Court found it unnecessary to rest its decision on this constitutional basis. However, the principle espoused is repeated in subsequent Supreme Court decisions.

The treaty in *Holden* involved a cession of non-Indian lands in return for tribal property. More common, however, were treaties in which Indian tribes ceded to the United States portions of their lands in return for, generally, some money and the creation of reservations. Usually these reservations consisted of tracts of territory originally occupied by the tribes and excepted by the treaty provisions from cession to the federal government. In order to fully comprehend the nature of the property interest transferred by the United States in these reservations it is necessary to understand the extent of the Indians' legal title prior thereto. The law early recognized the limited possessory rights of Indians in their territory. Ultimate title, that necessary to dispose of the property, rested solely in the hands of the federal government. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). The purpose of the reservation treaties was to transfer the Indian tribes' possessory rights to most of their property to the United States in exchange for a fee simple title in excepted reservations. Such treaties, then, clearly disposed of United States property interests.

Supreme Court cases involving these cessions have provided dicta similar to that of *Holden v. Joy.* In *Jones v. Meehan,* 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899), the Court considered the nature of Indian property rights acquired by "reservation." There, Chief Moose Dung of the Chippewas had "reserved" a certain tract of land in a treaty ceding tribal territory to the United States. He subsequently leased some of that property to various individuals. A challenge was made questioning the Chief's authority to engage in that transaction. As framed by the Court, the issue for resolution was whether the treaty merely confirmed Chief Moose Dung's original right of occupancy in the reserved lands or whether the treaty granted a fee simple interest to the reservee. In holding that a fee simple passed under the treaty,[19] the court noted that "[i]t is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States." 175 U.S. at 10, 20 S.Ct. at 5. Thus the Court concluded that the treaty power alone was sufficient to transfer the underlying United States title in the reserved lands. In a similar situation the Court in *Francis v. Francis,* 203 U.S. 233, 241–42, 27 S.Ct. 129, 51 L.Ed. 165 (1906), stated that "this court and the highest court of Michigan concur in holding that a title in fee may pass by treaty without the aid of an act of Congress."

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[19] *Jones v. Meehan* discussed and rejected as irreconcilable with later Supreme Court opinions the contrary views expressed by Attorney General Taney and Justice Nelson, which are also relied on by the dissent in the case before us. 175 U.S. at 12–14, 20 S.Ct. 1.

As is true of most of the cases in which the Supreme Court has addressed the scope of the treaty power, *Holden, Jones,* and *Francis* involved the federal government's interaction with Indian tribes. Because of the *sui generis* nature of the relationship between the Indian tribes and the federal government, it might be argued that these decisions are not dispositive.[20] We think, however, that they are persuasively supportive of the authority of the President and the Senate under the treaty clause.

V

While certain earlier judicial interpretations of the interplay between the property clause and the treaty clause may be somewhat confused and less than dispositive of the precise issue before us, past treaty practice is thoroughly consistent with the revealed intention of the Framers of these clauses. In addition to the treaties with Indian tribes upheld in the cases discussed above, there are many other instances of self-executing treaties with foreign nations, including Panama, which cede land or other property assertedly owned by the United States.[21] That some transfers have been effected through a congressional enactment instead of, or in addition to, a treaty signed by the President and ratified by two-thirds of the Senate present lends no support to appellants' position in this case, because, as stated previously, self-executing treaties and congressional enactments are alternative, concurrent means provided in the Constitution for disposal of United States property.

For instance, the Treaty with Panama of 1955, 6 U.S.T. 2273, transferred certain property (a strip of water and other sites within the Canal Zone) to Panama without concurring legislation by the Congress, while transfer of other property (owned by the United States but within the jurisdiction of Panama) was, under the terms of the treaty itself, dependent upon concurring legislation by the Congress. The decision to cast some but not all of the articles of conveyance in non-self-executing form was a policy choice; it was not required by the Constitution.

The transfer of property contemplated in the current instance is part of a broader effort in the conduct of our foreign affairs to strengthen relations with another country, and indeed with the whole of Latin America. The Framers in their wisdom have made the treaty power available to the President, the chief executant of foreign relations under our constitutional scheme, by and with the advice and consent of two-thirds of the members of the Senate present, as a means of accomplishing these public purposes.

We do not think it is relevant that many previous treaties couched in self-executing terms have been different in scope, dealing with boundary issues or otherwise ceding land which was claimed both by the United States and by a foreign nation.[22] We note

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[20] Although this unique relationship has often been cited as a basis for distinguishing "Indian cases," we question the applicability of the distinction to this case. This *sui generis* relationship is traditionally found in the context of individual rights, and it does not seem directly relevant to the scope of the treaty power vis-a-vis other sources of federal power. The Supreme Court long ago noted that "the power to make treaties with the Indian tribes is as we have seen, coextensive with that to make treaties with foreign nations." *United States v. 43 Gallons of Whiskey,* 93 U.S. 188, 197, 23 L.Ed. 846 (1876).

[21] *See, e. g.,* Florida Treaty with Spain of 1819, 8 Stat. 252 (256); Treaty Between the United States and Great Britain (Webster-Ashburton Treaty, 1842), 12 Bevans 82; Treaty between the United States and Japan (June 17, 1971), 23 U.S.T. 447, citations in note 22 *infra.*

[22] *See, e. g.,* The Treaty with Mexico of 1933 (Rectification of the Rio Grande), 9 Bevans 976; The Treaty with Mexico of 1963 (Solution of the Chamizal Problem), 15 U.S.T. 21; The Treaty with Mexico of 1970 (changing position of Rio Grande to maintain boundary), 23 U.S.T. 371; Florida Treaty with Spain, *supra* note 21.

The dissent asserts that the treaties with Mexico cited herein were not self-executing. However, the only portions of these treaties dependent upon legislation were provisions in the latter two treaties requiring the United States to acquire certain property from private individuals prior to ceding it to Mexico. Because such acquisition necessitated appropriation of funds, implementing legislation was re-first that it is hardly surprising that land transfers often involve boundaries or other disputed territory; indeed, it is in these situations that the decision to dispose of land would most often be made. Second, the grant of power to Congress in the property clause is not predicated on the territory disposed of being on a boundary or being the subject of conflicting claims. Thus we do not understand the basis for appellants' argument that, even if that clause does not provide the exclusive means of disposing of disputed or boundary lands, it is the exclusive source of power for disposing of land concededly owned by the United States. If the status of the land has any bearing on whether it may be conveyed without congressional enactment under the property clause,[23] it would seem to cut in a direction contrary to that urged by appellants, for the Western lands that were the focus of the property clause were the subject of conflicting claims by the states and the federal government.

[1, 2] It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding that Article IV, § 3, cl. 2 is not the exclusive method contemplated by the Constitution for disposing of federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized.[24] Our judicial function in deciding this lawsuit is confined to assessing the merits of the claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia*, the transfer of property of the United States, the treaty power as contained in Article II, § 2, cl. 2, was not legally available. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution.

For the foregoing reasons, the judgment of the District Court dismissing the complaint is

Affirmed.

MacKINNON, Circuit Judge, dissenting:

The United States Constitution in Article IV, § 3, cl. 2[1] provides that "The *Congress*

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quired, *see* pp. ——— of 188 U.S.App.D.C., pp. 1058–1059 of 580 F.2d, *supra*. Similarly, the treaties with Panama also will require implementing legislation for the payment of annuities to Panama and certain other provisions in the treaties. *See* Hearings Before the Subcommittee on Separation of Powers, *supra*, at 20 (Department of State Statement of Legislation Required to Implement Proposed New Agreement with Panama).

[23] It is exceedingly difficult to understand why the constitutionality of utilization of the treaty process should depend on whether the nation to which the land is conveyed has previously "claimed" such land.

[24] The dissent tends to obscure the distinction between the treaty power and presidential power asserted to be inherent in his authority to conduct our foreign relations. There is no doubt that the latter is more restricted than the former. As Professor Henkin notes:

> Whatever, then, [the President] might do by treaty or other international agreement . . . he cannot *unilaterally* regulate commerce with foreign nations, or make domestic laws punishing piracy or defining offenses against the nations or declare war. Equally, he cannot exercise, even for foreign affairs purposes, the general powers allocated to Congress: he cannot regulate patents or copyrights or the value of money, or establish post offices, or dispose of American territory or property. . . .

L. Henkin, *supra* at 94–96 (1972) (emphasis added). A similar view is expressed in the 1940 Opinion of the Attorney General indicating that the President could not, by *executive agreement*, transfer "mosquito" boats to Great Britain. 39 Op.Atty.Gen. 484 (1940). Additionally, the State Department Guidelines, upon which the dissent draws, states that:

> The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress. . . .

Department of State, 11 Foreign Affairs Manual § 721.2(a)2. Thus these too recognize that the President, when acting alone, has only limited power. However, we are not now faced with determining the permissibility of territorial cession by executive agreement. Before us is the much broader power established by the treaty clause of Art. II, § 2, cl. 2. Accordingly, these authorities are not applicable here.

[1] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S.Const. art. IV, § 3, cl. 2.

shall have power *to dispose of . . . property* belonging to the United States . . ." (emphasis added). Because of this specific constitutional provision, it is my opinion that the treaty clause[2] does not authorize the President to dispose of the large property interests of the United States in the Panama Canal Agreement without the approval of *Congress* to the transfer of the *property* involved. Yet the pending treaty with the Republic of Panama would violate the Constitution and disenfranchise the 435 members of the House of Representatives from voting as members of "the Congress" upon the proposal to "dispose of" eight billion dollars[3] worth of Canal "property belonging to the United States."[4] Since we are supposedly a participatory democracy, where the right and duty of the entire Congress to participate in that decision is clearly stated in the Constitution, and has been recognized by prior Presidents, it is almost impossible to understand the motivation for excluding the House of Representatives from exercising its constitutional authority.

In my opinion, Senator Connally of Texas, when he was Chairman of the Senate Committee on Foreign Relations, correctly interpreted the Constitution when he stated in the Senate debate on the procedure to be followed in authorizing a transfer of United States property to Panama:

> The House of Representatives has a *right* to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise.

88 Cong.Rec. 9267 (December 3, 1942) (emphasis added).

Recognizing that the House of Representatives has a vote on the disposition of the Panama Canal does not operate as a restriction on the "treaty" power. The *Per Curiam* opinion is in error in treating this as a matter of "power" when it is merely a question of ratification procedure. Treaties may still be entered into by the President upon all subjects that are amenable to international agreement, and to become effective the "treaty provisions" must be ratified by two-thirds of the Senate; but if any treaty attempts to "dispose of . . . Territory or Property belonging to the United States . . ." and it is ratified by the Senate, Art. IV of the Constitution still requires the concurrence of the House of Representatives to "carry out the obligations *by the enactment of legislation.*" *Id.*, Senator Connally, 88 Cong.Rec. 9270 (December 3, 1942) (emphasis added). In the transfer to Panama that was the subject of Senator Connally's remarks, the Senate by its vote acquiesced in that procedure and the House joined the Senate in voting to authorize the transfer of the property to Panama before the agreement was executed.

The net result is that unless it is previously approved by the "Congress," *i. e.*, the Senate *and the House of Representatives,*[5] the Constitution prohibits the effectuation of a self-executing agreement transferring the property in the Canal Zone belonging to the United States. The *Per Curiam* opinion reaches a different conclusion, but to my mind does not satisfactorily explain why this enormous disposition of property to the Republic of Panama should not recognize the proper role of Congress in such transfer as was followed in all prior transfers where the value of the property was infinitesimal compared to what is involved here. From its conclusion I thus respectfully dissent.

I. IS A POLITICAL QUESTION INVOLVED?

At the outset appellee defends on the theory that this case involves a political question which this court is without authority to decide. In other words, he contends that the treaty clause of the Constitution gives him the unchallengeable option to "dispose of . . . property belonging to the United States" without the approval of "the Congress" as set forth in Art. IV, § 3, cl. 2.[6] What this asserted defense amounts to is the claim that since he has already decided to proceed, and has taken certain steps that may violate the Constitution, the courts have no power to declare his conduct to be unlawful.

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[2] "He [the President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . ." U.S.Const. art. II, § 2, cl. 2.

[3] S.Ex.Rep. No. 95-12, 95th Cong., 2nd Sess., at 99 (Feb. 3, 1978) (hereafter "Committee Report").

[4] This opinion is confined to the Panama Canal Treaty and does not involve the Neutrality Treaty (for text of both agreements, *see* Appendix).

[5] Since the merits of the case are reached, the discussion of standing is set forth in footnote 42, *infra*.

A question is not deemed political, however, when its resolution is committed to the courts by the Constitution. *Elrod v. Burns,* 427 U.S. 347, 351, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (Brennan, J.); *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The issue here is plainly one that calls for a determination of which procedure is constitutionally required to approve an international agreement that will "dispose . . . of property belonging to the United States" of the value of eight billion dollars (S.Ex.Rep. No. 95–12, 95th Cong., 2nd Sess., at 99 (Feb. 3, 1978) (hereafter "Committee Report")).

The construction of treaties is the peculiar province of the judiciary. *Jones v. Meehan,* 175 U.S. 1, 32, 20 S.Ct. 1, 44 L.Ed. 49 (1899). This case presents a question for which there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." Instead, the question is purely judicial; it is committed by Art. III, § 2 to the courts established pursuant to Art. III, § 1 in which the "judicial power [is] vested." It is the type of controversy that the United States courts decide every day, and there is no lack of judicial and manageable standards for resolving it. Nor is the issue impossible for the courts to decide without a prior policy determination clearly involving non-judicial discretion. Since the issue is solely one of constitutional interpretation and both parties to the controversy are firmly committed to adhering to the dictates of the Constitution, and it is a relatively simple matter to do so, a proper declaration of the correct constitutional procedure would not embarrass or indicate any lack of respect due the two coordinate branches that are represented by the parties hereto. It should also be added that the issue is so clearly answered by the Constitution that the case does not involve any unusual need to adhere to any prior political decision. Therefore our authority to decide the issue is clear. *Baker v. Carr, supra,* 369 U.S. at 217, 82 S.Ct. 691.

II. THE EXCLUSIVE POWER TO DISPOSE OF PROPERTY BELONGING TO THE UNITED STATES

No contention is advanced by this opinion that "Article II treaty power stops where the power of Congress begins," (Appellee Br., p. 12) but it is contended that in any international agreement the ratification or authorization procedure must conform to *specific* constitutional provisions. Therefore, the specific provisions of the Constitution outside of Art. I, § 8, which designate "Congress" as the body to levy taxes (Art. I, § 7), appropriate money (Art. I, § 9), and dispose of Government *property* (Art. IV, § 3, cl. 2), require that international agreements that transgress into these areas can only become effective by enactments of Congress. The President cannot violate any of these provisions under the claimed need or desire for a self-executing treaty.

The issue we are confronted with at the outset concerns the proposal in the Panama Canal treaty (*see* Appendix) that would immediately replace the interest *in perpetuity* of the United States in the Panama Canal to act "as though it were sovereign" with a mere 21-year operational right, would immediately transfer the entire Panama Railroad and certain other valuable structures (Appendix, Art. XIII), and would eventually provide for the *automatic* transfer on December 31, 1999, of whatever interest the United States still retained in the entire Panama Canal. Appellee claims all this can be accomplished by the pending Carter-Torrijos treaty with nothing more than Senate approval; and that the participation of the House in those parts of the agreement that dispose of property belonging to the United States is not required and will not be sought. Such construction conflicts directly with the above-quoted provision of the Constitution and with past practices. A number of Supreme Court decisions also contain statements which recognize the exclusive power of *Congress* under Art. IV, § 3, cl. 2 to dispose of United States territory and property.

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[6] *See* note 1 *supra.*

A. *The Supreme Court Decisions*

The decision in *Alabama v. Texas,* 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689 (1954), involved a motion by the States of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act of 1953. In a *Per Curiam* opinion, the motions were denied on the ground that Art. IV, § 3, cl. 2 prohibited such suits by the states:

> The power of *Congress* to dispose of any kind of property belonging to the United States "is vested in Congress *without limitation.*" [Quoting *United States v. Gratiot,* 39 U.S. (14 Pet.) 526, 537, 10 L.Ed. 573.]

347 U.S. at 273, 74 S.Ct. at 481 (emphasis added).[7] Much earlier in *Gibson v. Chouteau,* 80 U.S. (13 Wall.) 92, 99, 20 L.Ed. 534 (1872), the Court had stated:

"With respect to the public domain, the Constitution vests in *Congress* the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."[8] (Emphasis added.)

In *Wisconsin Central Railroad Company v. Price County,* 133 U.S. 496, 504, 10 S.Ct. 341, 344, 33 L.Ed. 687 (1890), the Court remarked: "[Art. IV] implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." This same conclusion was reached in *United States v. Celestine,* 215 U.S. 278, 284, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909):

> By the second clause of § 3, art. 4 of the Constitution, *to Congress and to it alone,* is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." [Emphasis added.]

The Supreme Court in *Sioux Tribe v. United States,* 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942) also acknowledged the power of the Executive to withdraw lands from the territory subject to their being sold, but recognized that the power to *dispose* of the land rested in the Congress:

> Section 3 of Article IV of the Constitution confers upon Congress *exclusively*

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[7] The *per curiam* understates the significance of many of the cases discussed here. For example, the majority concedes that *United States v. Gratiot,* 39 U.S. (14 Pet.) 526, 10 L.Ed. 573 (1840), does not involve a question of state-federal relations. While *Gratiot* did not involve the precise situation presented by this case, the principle relied upon therein—that the power to dispose of property rests exclusively with the Congress—should similarly, in my view, guide our disposition here. The majority seeks to distinguish away many of the Supreme Court's statements by noting that the context in which they were made involve state-federal relations and not separation of powers. *Gratiot,* among other cases, does not involve state-federal relations. While the holdings in those cases may not control our facts, it is submitted that the principle relied upon in those cases accurately states the proper construction of the provisions of the Constitution involved in this case.

[8] *See Sierra Club v. Hickel,* 433 F.2d 24, 28 (9th Cir. 1970), *aff'd,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972): "Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited." The Court stated in *United States v. San Francisco,* 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940): "The power over the public land thus entrusted to Congress is without limitations." The Court has also stated:

> *Congress has the same power over* [*territory*] *as over any other property belonging to the United States; and this power is vested in Congress without limitation,* and has been considered the foundation upon which the territorial governments rest.

United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537, 10 L.Ed. 573 (1840) (emphasis added).

> "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

316 U.S. at 324, 62 S.Ct. at 1098 (emphasis added). However, Congress had previously revealed its awareness of this practice and acquiesced in it (316 U.S. at 324–25, 62 S.Ct. 1095).

Geofroy v. Riggs, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642 (1890) remarks:

> The treaty power, as expressed in the Constitution, is in terms unlimited *except by those restraints which are found in that instrument* against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541 [5 S.Ct. 995, 29 L.Ed. 264]. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

133 U.S. at 267, 10 S.Ct. at 297 (emphasis added). In my view, one of the "restraints" to which *Geofroy* refers is the Art. IV, § 3, cl. 2 power vested in Congress to dispose of property. By treaty, the President could not sell or give away Alaska to another country. Similarly, in my view, the President by treaty cannot dispose of our property in the Panama Canal without authorization from *Congress.*

Another decision which discusses the treaty power is *Asakura v. Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924):

> The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend *"so far as to authorize what the Constitution forbids,"* it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy v. Riggs*, 133 U.S. 258, 266, 267 [10 S.Ct. 295, 33 L.Ed. 642]; *In re Ross*, 140 U.S. 453, 463 [11 S.Ct. 897, 35 L.Ed. 581]; *Missouri v. Holland*, 252 U.S. 416 [40 S.Ct. 382, 64 L.Ed. 641].

265 U.S. at 341, 44 S.Ct. at 516 (emphasis added). Since the treaty power does not extend so far as to authorize what the Constitution forbids, the power does not extend so far as to permit the disposal of our territorial and property interest in the Panama Canal without the approval of Congress as required by Art. IV, § 3, cl. 2.

If the scope of the treaty power were so broad as to permit such disposal, then the statements of the Supreme Court would be incongruent: if the treaty power were that broad, there would be a need to explain why Art. IV was not an express power limiting Art. II. Since there are no references to this possible conflict, it seems reasonable to state that the Court never conceived that the treaty power might be so broad as to permit disposition of property covered by Art. IV. These cases are wholly consistent with the Supreme Court's rulings concerning the treaty power.

Thus, the proper construction of the constitutional provisions is straight-forward and sensible. The treaty power is not limited by any express power in the Constitution *because it does not extend so far as to permit the disposition of property without an Act of Congress.* The power of Congress to dispose of property has no limit—in the language of *Celestine*, it resides in Congress alone; and thus, the treaty power is not a restriction on Congress, because it cannot operate to dispose of United States property.[9]

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[9] When Jefferson was Secretary of State, he issued instructions on March 18, 1792 to the American Commissioners negotiating with Spain as to the boundary between Georgia and the Floridas, stating that the right to alienate even an inch of territory belonging to a member of the Union did not exist in the central government. American State Papers For. Rel., I 252. Jefferson was undoubtedly referring in part to the limitations imposed by Art. IV.

B. *Comparison of the Powers of Congress to Levy Taxes, to Make Appropriations and to Dispose of Property*

That Congress has exclusive power to dispose of United States property is also demonstrated by a comparative analysis of those delegated powers in which the right of Congress is admitted to be exclusive.

In overview, it is important to realize that the power to make treaties does not confer absolute authority upon the President and the Senate. It is a very broad power, but it is not unlimited. As a noted authority wrote before the form of the instant Panama Treaty became a national issue:

> Broad assertions and extravagant adjectives, some of them supported by the Supreme Court, might leave the impression that the President can exercise virtually all the national political power in foreign affairs, at least concurrently with Congress. In fact, large areas have never been claimed by him [except now in the Panama Canal Treaty]. In principle, it would be difficult for a President to dispute that by vesting in Congress "all legislative Powers herein granted" *and* granting it a comprehensive array of specific powers, the Constitution barred the President from exercising these powers even as regards foreign affairs. Whatever, then, he might do by treaty or other international agreement . . . , he cannot *unilaterally* regulate commerce with foreign nations, or make domestic laws punishing piracy or defining offenses against the law of nations, or declare war. *Equally, he cannot exercise, even for foreign affairs purposes, the general powers allocated to Congress: he cannot* regulate patents or copyrights or the value of money, or establish post offices, or *dispose of American territory or property;* he cannot enact necessary and proper laws to carry into execution the powers of Congress or even his own powers, for example, criminal laws to enforce an arms embargo. He cannot spend money on his own authority for foreign aid, or draw funds from the Treasury, without Congressional appropriation, to build an embassy. Presumably, the unexpressed lawmaking powers of Congress deriving from national sovereignty are also generally denied the President: he cannot enact general immigration laws by executive order.

L. Henkin, Foreign Affairs and the Constitution 94–96 (1972) (emphasis and matter in brackets added). The foregoing quotation does not support the assertion that Henkin's treatise agrees with the conclusion of the *Per Curiam* opinion. *Cf. Per Curiam* op., at —— n. 4, of 188 U.S.App.D.C., at 1057 n. 4, of 580 F.2d.[10]

The *Per Curiam* opinion grasps at the word "unilaterally" in one sentence and asserts therefrom that Henkin in the next sentence is also speaking solely of the President's power to act "unilaterally." Such construction cannot be supported. Henkin, in the first sentence, is referring to *unilateral* action by the President that transcended what "he might do by treaty or *other international agreement*." However, in the very next sentence, which is the critical sentence, Henkin shifts to deal with the President's entire "foreign affairs purposes" and these unquestionably refer to his powers to enter into treaties, international agreements, as well as to act *unilaterally* and by "executive order" as referred to in the last sentence of the quoted paragraph. In this broad context Henkin states that the President "cannot . . . dispose of American territory or property . . . ." It is absurd to suggest that this statement by Henkin was only intended to state that the President was prohibited from disposing of American territory or property by *executive agreement*, and not by treaty, since no person has ever suggested that American territory could be disposed of by a mere executive agreement with another nation, much less by *unilateral* action or executive order without congressional approval. Henkin's statement with respect to the disposition of American territory and property thus included the President's power to make treaties and international agreements as well as his power to act unilaterally and by executive order. These are all encompassed within "foreign affairs purposes." It must thus be admitted that the present treaty is an attempt by the President to "dispose of American territory [and] property . . . for *foreign affairs purposes*"—and that Henkin states this cannot be done by treaty. Thus, Henkin is *not* "in agreement with [the *Per Curiam*] opinion." *Per Curiam* at —— n. 4, of 188 U.S.App. D.C., at 1057 n. 4 of 580 F.2d. Not that Henkin is authoritative or binding—he is a highly respected professor.

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[10] The *Per Curiam* opinion states at note 4 that among the authorities agreeing with its position is Prof. Henkin. The quotation above is from a subsection entitled "Exclusive Powers of Congress." The subsequent section on "Concurrent Powers" does not contain a statement that the general powers addressed in the "exclusive power" section can be exercised concurrently by treaty. This opinion does not contend that the Executive lacks the power to make a treaty disposing of property but rather that such treaty requires an act of Congress to become effective. Henkin does not address this question directly, and his comments are not inconsistent with this position. *See* Henkin, *supra,* at 149. The passage to which the majority refers as indicating that Prof. Henkin is in accord with its position begins with the statement: "Some obligations, it is accepted, cannot be executed by the treaty itself." Examples follow: appropriation of funds, enactment of criminal laws, and probably declaration of war. Nothing in that passage states or implies that the list is exhaustive.

It is not surprising that those promoting the present treaty also decide that they have power to accomplish the result they seek. It is ever thus with usurped authority. *Cf. Per Curiam,* at —— n. 4, of 188 U.S.App.D.C., at 1057 n. 4, of 580 F.2d. The Senate precedent, however, is directly contrary. *See* Part IV, and particularly pages —— to —— of 188 U.S.App.D.C., pages 1083 to 1084 of 580 F.2d.

The powers of government insofar as they may be exercised by treaty, are thus subject to the *specific* limitations imposed by the Constitution. First, Art. I, § 7, cl. 1, of the United States Constitution provides:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Second, Art. I, § 9, cl. 7, provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Henkin has stated—and the appellee recognizes—that in a treaty the Executive cannot obviate these provisions by levying taxes or appropriating money from the United States Treasury.

In 1844 the President laid before the Senate a treaty he had negotiated which for at least three years would place the power to exceed certain maximum import duties beyond the power of Congress. The Senate, however, took the view that the constitutional method of imposing regulatory duties was by Act of Congress rather than by treaty. 2 Hinds' Precedents § 1532, at 998–1001. In a subsequent instance when the right of the Senate to act on a treaty was questioned, the Senate observed that the right of Congress to act by legislation was admitted and therefore the Report of the Senate Committee on Foreign Relations recommended that the treaty be amended by inserting: "This treaty shall not take effect until the same shall have been approved by the Congress." 2 Hinds' Precedents § 1533, at 1001–1002. The property transfer portion of the present treaty could be handled accordingly as all governments are on notice of the constitutional requirements of Art. IV.

Appellee also recognizes, as Henkin states, *supra*, that a Declaration of War is subject to the same limitation: it is beyond the President's *unilateral* power to declare war by edict. Likewise all seem agreed that "the United States cannot declare war" by treaty. Henkin, *supra*, at 159–60. That conclusion, however, devolves from the provision of Art. I, § 8, which states "Congress shall have Power . . . To declare War." There is nothing in the Constitution which specifically forbids a President from declaring war to comply with a prior treaty. The Committee Report relies upon "the unique legislative history of the declaration of war clause" which supposedly "clearly indicates the power was intended to reside jointly in the House and Senate." Committee Report, at 74. This admits that the House of Representatives has a "share of the warmaking power," *id.* To read the clause as a concurrent power would unconstitutionally confer upon the President the power to declare war. However, since the President is commander-in-chief and represents the nation in our foreign relations, there is even less reason to read in the necessity for House participation in a declaration of war from the language of Art. I, § 8, solely the asserted history of the clause, then there is *to give effect to the separate constitutional limitation specifically requiring an Act of Congress to dispose of United States property as set forth in Art. IV, § 3, cl. 2.* This, unlike the war power, is one of the "general powers allocated to Congress" that Henkin recognizes the President cannot exercise in a treaty. Henkin, *supra.*

This then brings us to the placement of the power to dispose of Government property. This power is not specifically included in the general enumeration of powers set forth in Art. I, § 8, but it is undoubtedly one of the "general powers" "necessary and proper" for carrying into execution the previously enumerated powers and practically all other powers. In a separate provision outside Art. I, § 8 (like the taxing and appropriation provisions), Art. IV, § 3, cl. 2 imposes the requirement that "The *Congress* shall have Power to dispose of . . . Territory or Property belonging to the United States." (Emphasis added.)

In imposing a specific procedure *outside Art. I, § 8,* for "Congress" to dispose of Government property, the Framers followed the same pattern as they did with respect to the other *general provisions* of the Constitution—levying taxes and making appropriations. Thus, Art. IV in requiring action by *both* Houses of Congress is cast in exactly the same mold as the tax and appropriation powers. Therefore, under the format of the Constitution, disposing of the United States' *property interests in the Panama Canal by a donation is entitled to action by the Congress to the same extent as would be an appropriation for the same amount which admittedly could only be accomplished by enactment of the "Congress."* It must thus be recognized that what is clearly required in the Carter-Torrijos Panama Canal Treaty is exactly what was done in the 1955 treaty involving the Panama Canal Zone: an Act of Congress was required to approve those provisions of the treaty which called for the disposition of United States property.[11]

To say that the Constitution is loose in this particular, and that it permits the President to have a free choice between bypassing the House, as is proposed here, and submitting the matter to the House and the Senate as was done in 1955, is to permit an important constitutional provision to be bypassed in the name of expediency—the exact motivation for which is not readily apparent. If there is any policy inherent in this decision, it should be to determine that at least a majority of the nation's representatives who have been elected on a one man-one vote apportionment support the property disposition portions of the treaty. Even a casual survey of the treaty (*see* Appendix) indicates that a great deal of implementing legislation is required and contemplated, and it has been recognized since 1796, *see* text at —— of 188 U.S.App.D.C., at 1075 of 580 F.2d, *infra,* that the President and the Senate cannot foreclose the House of Representatives from exercising its independent constitutional authority in all respects.

There are two other obvious matters which appear to require implementing legislation that a treaty cannot assure: .

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[11] At that time Congress, in accordance with the language of the treaty, did enact legislation enabling the transfers agreed to in the treaty to be perfected. Pub.L. 85–223, 71 Stat. 509 (August 30, 1957) had the purpose of "authoriz[ing] and direct[ing] the fulfillment of those provisions of the [1955 Treaty], which contemplate, *subject to authorization by the Congress,* the conveyance of various lands and improvements to the Republic of Panama . . . ." (Emphasis added).

(1) Art. III, § 5, requires the Panama Canal Commission (constituted by and in conformity with the laws of the United States, *see* Art. III, § 3) to pay the Republic of Panama for municipal services "ten million United States dollars . . . per annum." The treaty does not provide that this sum will be paid annually from Canal tolls, which in any event are covered into the United States Treasury, and an appropriation may be required. At page 188 of —— U.S.App.D.C., at page 1058 of 580 F.2d the *Per Curiam* opinion states:

> Thus, the expenditure of funds by the United States cannot be accomplished by self-executing treaty . . .

I agree. From the foregoing it also appears that this "self-executing treaty [does] require the expenditure of funds by the United States . . . " Hence, as the *Per Curiam* opinion states, the transfer "cannot be accomplished" and the treaty cannot be valid in its present form.

The treaty is self-executing in that it purports to create an annual liability of the United States for the sum of $10 million. It appears, from note 22 at page —— of 188 U.S.App.D.C., at pages 1063–1064 of 580 F.2d of the *Per Curiam* opinion, that the majority agree with this interpretation.

(2) Art. X, § 9 of the treaty also authorizes the affiliation of employees of the Panama Canal Commission with local and international unions, that they may negotiate collective bargaining contracts *with the Panama Canal Commission, and that labor relations with employees "shall" be conducted in accordance with forms of collective bargaining established by the United States after consultation with employee unions.* This apparently makes a collective bargaining contract mandatory and in operation might require all Panama Canal workers to belong to a particular labor organization. It seems to be pure legislation with respect to the employee relations of the United States' employees and is very far-reaching. The briefs do not discuss the issue and no authority has been cited in support of this obvious legislative action. It would thus appear to be extremely doubtful that the President is authorized to commit the United States to all of this procedure without approval of Congress.

C. *The Restatement of Foreign Relations Law and the Constitutional Requirements for the Disposition of United States Property*

The Restatement, Second, Foreign Relations Law of the United States, is hardly authority for the proposition that the power to dispose of property *concurrently* resides in Art. II and in Art. IV of the Constitution. The majority cite, as the section most strongly supporting the concurrent power notion, a sentence in comment (f) to section 141:

> The mere fact, however, that a congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power.

Per Curiam at —— of 188 U.S.App.D.C., at 1058 of 580 F.2d. In applying this broad single sentence to the specific constitutional power here vested in Congress, the majority ignore the general thrust of the Restatement.

The section of the Restatement which explains the relative boundaries of the treaty power and the powers delegated to Congress is section 118(1). That section states that the power of Congress to enact legislation does not limit the treaty power; but in so providing, that section does not stand for the proposition that property belonging to the United States may be disposed of by treaty without approval by the Congress. Section 118(1) states:

> An international agreement made by the United States as a treaty may deal with any matter as to which the United States has the *constitutional power* to make an international agreement under the rules stated in § 117. [Emphasis added.]

Comment (b) to that section states:

> *b. Treaty power and power of Congress compared.* The treaty power of the United States is not limited by the extent

> of the powers delegated to the Congress by the Constitution. This follows from the fact that the treaty power is itself an independent power granted to the President and the Senate under the Constitution.

Nothing in section 118, however, supports a power to dispose of government "property" by treaty without the consent of the Congress. The Constitution vests that power in Congress by a separate provision. *In so doing, the grant to Congress of the power does not operate to impose a limitation on the power of the President to enter into international agreements but instead merely provides the necessary implementing procedure that must be complied with under the Constitution before certain international agreements become fully effective to accomplish their stated purpose.*

This opinion does not contend for its thesis, as the *Per Curiam* opinion attributes (rightly or wrongly) to Professor Raoul Berger, "that the President and Senate cannot exercise under the treaty power any power granted to Congress . . ." *Per Curiam,* at —— n.4, of 188 U.S.App.D.C., at 1057 n.4 of 580 F.2d. Admittedly such construction would "virtually wipe out the treaty power," as Henkin states. Furthermore, however, this opinion does not contend, as the *Per Curiam* opinion might conclude, that the President under his treaty power can exercise practically all the powers granted to Congress. That would, to paraphrase Henkin, "virtually wipe out the legislative power" in many recognized fields.

To be more specific, and to deal with the facts of this case, rather than attempting to write broad dicta, this opinion does contend that the treaty power cannot wipe out powers granted to Congress with the specificity indicated in Art. IV, § 3, cl. 2. Beyond that this opinion draws no line; but to my mind it seems clear, for the following and other reasons, that the placement of this separate paragraph in an article and section removed from Art. I, § 8 carries with it somewhat the same purpose to indicate exclusive congressional power that one derives from the location outside Art. I, § 8 of those provisions which impart exclusivity to Congress in the exercise of the taxing and appropriation powers.

The foregoing interpretation is consistent with the language of section 117 of the Restatement, which is referred to in section 118. Section 117 provides:

> (1) the United States has the power under the Constitution to make an international agreement if
>
> * * * * * *
>
> (b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States.

Comment (d) states:

> No power granted to the United States by the Constitution is unlimited. The power of the United States to make international agreements is not an exception to this rule. The extent of each power grounded in the Constitution must be determined not only by the constitutional language granting it but also by the restrictions placed upon it *by other constitutional limitations.*

The comment seems to be addressed in part to such constitutional restrictions as were added by the Bill of Rights. For example, the President and the Senate could not cause a treaty to go into effect which abridges the freedom of speech of the American citizenry. The power of Congress to dispose of "property" fits precisely within this same classification but may have a stronger base in the intendment of the Framers since it was part of the original Constitution. Other constitutional limitations—here Art. IV, § 3, cl. 2—thus place restrictions upon the manner of implementing the treaty power: property cannot be disposed of without the approval of Congress. Section 117 is consistent with this.

Section 141(3), which is relied upon by the majority, does not disparage this analysis in any respect. That section provides:

> A treaty cannot be self-executing under the rule stated in Subsection (1) and have the effect stated there *to the extent that*

> *it involves governmental action that under the Constitution can be taken only by the Congress.*

(Emphasis added.) By way of illustration, comment (f) states:

> *f. Constitutional limitation on self-executing treaties.* Even though a treaty is cast in the form of a self-executing treaty, it does not become effective as domestic law in the United States upon becoming binding between the United States and the other party or parties, if it deals with a subject matter that by the Constitution is reserved *exclusively* to Congress. For example, only the Congress can appropriate money from the treasury of the United States. (Emphasis in original)

> Illustration:
>
> 8. The United States enters into a treaty with state A under which A agrees to cede a portion of its territory to the United States in return for payment of $7,200,000. Advice and consent to the ratification of the treaty is given by the Senate and it is ratified by the President. The ratification does not have the effect of appropriating the $7,200,000. *Further action to this effect must be taken by both Houses of Congress.* (Emphasis added).
>
> The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power. Thus the fact that Congress has power to regulate commerce with foreign nations does not mean that the making of a self-executing treaty dealing with foreign commerce is precluded; in fact, many provisions in treaties dealing with foreign trade and commerce are self-executing.

The comment explicitly states that a treaty cannot be self-executing if it deals with a subject that is reserved exclusively to Congress. Art. IV, § 3 provides that Congress "shall," thus *exclusively,* dispose of property of the United States, just the same as "only the Congress can appropriate money from the treasury of the United States." The two powers, *i.e.,* dispose of property and appropriate money, are practically identical, and there is every reason to suspect that the Framers intended that both powers should be exclusively exercised by Congress. A disposition of Government property is to all intents and purposes an appropriation thereof. The Rules of the House of Representatives originally adopted in 1794 and amended in 1874 and 1896 have equated the appropriation of property with other appropriations:

> All . . . bills making *appropriations of money, or property* or requiring such appropriation to be made . . . shall first be considered in a Committee of the Whole . . .

Rules of the House of Representatives, 95th Cong. (1977), Rule XXIII, ¶ 1, § 865 (emphasis added). In addition, Rule XIII, ¶ 1, § 742 speaks of

> First. A calendar of the Committee of the Whole House on the state of the Union, to which shall be referred . . . bills of a public character directly or indirectly *appropriating money or property.*

(Emphasis added.) *See* 4 Hinds' Precedents § 4840, at 1050 (1907).

It is unreasonable to suggest that the Constitution is more concerned with the transfer of eight billion dollars of United States *funds* from the Treasury than with the transfer of eight billion dollars of United States *property.* And the potential earning power of the Canal makes it much more valuable even than eight billion in dollars.[12]

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[12] In footnote 7, the *Per Curiam* opinion states that "there are numerous instances in past treaty practice [of the] . . . disposition of United States property through self-executing treaty." The correctness of this statement is challenged. *See* Part VI hereof. There is no instance in the entire history of the United States that has been brought to our attention where any disposition of United States property even approaching the character and magnitude here involved was ever handled by a self-executing treaty.

Said footnote further states that "we know of no instance in which the United States has been *in a state of formally declared war* without a congressional declaration thereof." (Em-

It was observed in the discussion of the Supreme Court precedents that it is undisputed that the treaty power is not *limited* by the extent of the powers delegated to the Congress. Yet this does not mean that the general treaty power, so far as it exists, can overrun *specific* constitutional provisions. To state the proposition otherwise, the treaty power is not *so broad in the first instance* that it permits the disposition of property of the United States to be made other than in the manner specifically provided for by Art. IV, § 3, cl. 2. The treaty power clearly allows the President with the approval of the Senate to establish rights and obligations between this nation and other countries. However, the actual power to dispose of property *exclusively* rests in the Congress—which includes the House of Representatives, *i. e.*, a treaty cannot without the approval of both houses transfer *property* belonging to the United States. Justice Jackson, when as Attorney General in 1940 he advised President Roosevelt on the fifty destroyers transaction with Great Britain, held that the exchange for British bases was permissible because Congress had *previously* given the President such statutory authority to transfer unneeded naval vessels. He further advised, however, that since Congress had not by law given greater authority, the President was precluded from transferring *new* mosquito boats that were under construction. 39 Op.Atty.Gen. 484 (1940), 86 Cong.Reg. 11355. This recognized that, even in those critical times, only Congress could authorize the disposition of United States property.

It is unquestioned that the *negotiation* of treaties rests solely in the President. As Justice Sutherland declared for the Court in 1936:

> He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it . . .

United States v. Curtiss-Wright Corp., 299 U.S. 304, 319, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936). From the earliest times of our country, however, as reflected in a resolution adopted by the House of Representatives in 1796, it has been established:

> That when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the *House of Representatives* in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.

5 Annals of Congress 782 (1967) (emphasis added). The House of Representatives in 1871 adopted a resolution to similar effect. Cong. Globe, 42d Cong., 1st Sess. 835 (1871). Senate Document 92–83, 92d Cong., 2d Sess., 488, notes that the early precedents which prohibited a treaty from circumventing the constitutional appropriation power of Congress (Art. I, § 9), have *"apparently been uniformly adhered to" since 1796.*[13]

The last paragraph of comment (f), from which the majority quote, only illustrates the necessity for analyzing each case separately. This is precisely what the majority has not done. The *mere fact* that a congressional power exists, is not, *by itself,* enough to render a treaty touching that

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phasis added.) That is a safe statement because a "*formally declared* war" can never exist without a congressional *declaration* thereof. Thus, the statement by its limitations *implicitly* carries its own proof. However, if the statement was intended to convey the impression that the President has never usurped the Congressional power to declare war, it must be recognized that there is no difference in the format of the grant of that exclusive power to Congress from the grant to Congress of the power to dispose of territory and property. Therefore, by the same token, the President has no more power from the wording of the Constitution to dispose of United States territory and property than he does to declare war.

[13] Citation is made to: S. Crandall, Treaties, Their Making and Enforcement (Washington: 2d ed. 1916), 171–182; 1 W. Willoughby, The Constitutional Law of the United States (New York: 2d ed. 1929), 549–552. *See also* H.Rept. 4177, 49th Cong., 2d Sess. (1887). *Cf. De Lima v. Bidwell*, 182 U.S. 1, 198, 21 S.Ct. 743, 45 L.Ed. 1041 (1901).

power ineffective without legislative action. However, there are some congressional powers—appropriation, revenue, and *disposal of property*—which are so basic to the legislative function and are so intrinsically legislative that the treaty power cannot operate without the concurrent exercise of the congressional power. The power to dispose of property is a power with specific constitutional limitations, substantially identical to the appropriation power, and by the Constitution, like the appropriation power and the power to levy taxes, it rests exclusively with the Congress. The transfer of property to the Republic of Panama requires an Act of "Congress" pursuant to Art. IV, § 3, cl. 2. Section 141(3) is consistent with this approach.

In short, it does not appear that anything in the Restatement supports the proposition that the Panama Canal, the Panama Railroad, and the other United States property which the Carter-Torrijos Treaty proposes to convey to Panama, can be transferred except by the "Congress." The treaty power is thus not unlimited and any treaty which disposes of substantial government property must, in that respect, be approved by both houses of Congress before coming into full force.

D. *Exclusive Language and the Placement of Article IV*

Appellee advances two other arguments for the proposition that the power to dispose of United States property rests concurrently in the Executive and the Congress. First, it is suggested that since the property disposal clause does not use the same "exclusive language" as the appropriations and revenue clauses, the power to dispose of property must be concurrent. *See* Appellee Br. at 9. Second, it is argued that the property disposal clause is found in Art. IV which deals with state-federal and state-state relationships. This, it is argued, strongly suggests that the provision was intended to distribute power between the state and federal governments rather than among the three branches of the federal government. *Id.* This argument however, is an incomplete answer. This is so because once a power is distributed between the state and federal government it must still be distributed between the three departments that constitute the three federal departments.

The first argument, that because the property disposal clause does not use, what is termed, "exclusive" language, the power rests concurrently in the Executive and the Congress, misapprehends the nature of Art. IV.

Of course the terminology by which a power is delegated to Congress is significant, and may be completely controlling in determining the scope of the President's treaty power; but each situation must be considered separately on its peculiar facts. *If any reasonably general statement were to be formulated for drawing the line at a point where the President's treaty power terminates, it would be at that point where the Constitution indicates that a legislative power was to be exercised.* That applies to the taxing and appropriation power. And it is submitted that the Constitution is addressing itself to legislative enactment in Art. IV when it confers the power on *Congress* "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." Certainly to "make all needful Rules and Regulations" refers to legislation. This clause is the source of the power that Congress exercised for more than a century in legislating for our territories, before they became states.[14]

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[14] *E. g., Dorr v. United States,* 195 U.S. 138, 149, 24 S.Ct. 808, 813, 49 L.Ed. 128 (1904) ("We conclude that the power to govern territory, implied in the right to acquire it, and *given to Congress in the Constitution in article 4, § 3,* . . . does not require that body to enact for ceded territory, not made a part of the United States by *congressional action,* a system of laws which shall include the right of trial by jury, and that the Constitution does not, *without legislation,* and of its own force, carry such right to territory so situated." [emphasis added]); *Benner v. Porter,* 50 U.S. 235, 240, 13 L.Ed. 119 (1850) ("[The territorial governments] are not organized under the Constitution, nor subject to its complex distribution of

Providing for the disposition of property of the United States must also be recognized as a close counterpart to enactments providing for the appropriation of money to the United States. The paragraph is thus referring throughout to action by Congress.

Thus, the fact that the property disposal clause does not refer specifically to the "House," or to a "law" as in the taxing and appropriation clauses, is not controlling, because it otherwise indicates that the *Congress shall* have power to *legislate* for the territories and property belonging to the United States. It further lays down a very broad restriction, on all acts of the legislature, executive and judiciary, *i. e.*, that nothing said in the Constitution should be construed to prejudice any claims of the United States or of any State.[15]

It is a gross understatement to construe the constitutional powers conferred by Art. I, § 8 and Art. IV, § 3, cl. 2 merely as though "these provisions state *simply* that Congress shall have power to take action on the matters enumerated." *Per Curiam*, at — of — U.S.App.D.C., at 1059 of 580 F.2d (emphasis added). The first error in this statement is to include the separate and *special* provision contained in Art. IV, § 3, cl. 2 with the *general* enumeration of powers set forth in Art. I, § 8. The difference in composition and location of these two sections indicated a difference in purpose and intent. The Constitution in Art. IV does "[state] the particular matter of concern, *i. e.*: the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." It has long been recognized that *expressly* conferring this power on Congress implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." *Wisconsin Cent. R.R. Co. v. Price County*, 133 U.S. 496, 504, 10 S.Ct. 341, 33 L.Ed. 687 (1890); *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 167–168, 6 S.Ct. 670, 29 L.Ed. 845 (1886). The specific grant of power to Congress implicitly operates to deny that the power vests elsewhere. *United States v. MacCollom*, 426 U.S. 317, 321, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976); *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *T.I.M.E. v. United States*, 359 U.S. 464, 471, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 73 L.Ed. 379 (1929).

The second argument also inaccurately analyzes Art. IV. It is too narrow a view of the property disposal clause to say that it is found in Art. IV, which deals with state-

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the powers of government . . . but *are the creations exclusively, of the Legislative Department*, and subject to its supervision and control." [emphasis added]); *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542, 7 L.Ed. 242 (1828) ("Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers *Congress* 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.'" [emphasis added]).

[15] In the passage of Henkin relied upon the majority, the following statement appears in a footnote:

> It has been suggested that treaties that deal with matters on which Congress could legislate could not be self-executing . . . In the numerous instances in which acts of Congress were held to supersede treaty provisions . . ., there was no suggestion that the treaty was not law anyhow since it could not be self-executing.

Henkin, *supra*, at 159 (in note). This section is discussing the effect of treaties as law—and not where the power to *implement* the treaty resides. In this regard, a later statement in the footnote is relevant:

> Congress has often insisted that treaties modifying tariffs are not self-executing and require Congressional implementation, and the Executive has generally acquiesced. Crandall, Treaties 195–200 . . . In recent years tariffs have been the subject of executive agreements authorized by Congress or requiring Congressional implementation.

Id. At best, one could say that Henkin has made some statements, which if read out of their context, might lead to conflicting results. It is my view that his statement at 94–96, quoted above, is definitive and conclusive—the Executive may not use his foreign affairs powers to dispose of United States territory or property, since that power is specifically vested in the Congress by Article IV—and points to a position opposite to the *per curiam*.

federal and state-state relationships, and to conclude therefrom that the whole provision must be considered solely as distributing power between the state and federal governments rather than among the three branches of the federal government. Such argument ignores the fact that the Constitutional Convention went further and specifically designated which of the three departments was to exercise the power to dispose of United States property, to-wit: "The Congress . . ." As previously noted, the power is essentially legislative and the "Power" to exercise it was placed in the Congress, where the Constitution placed other general and specific legislative authority.

It is also significant that the Constitution in Art. IV also placed the power in "The Congress" to enact general laws to implement the full faith and credit clause and to admit new states. The designation of Congress to exercise these powers cannot be blandly dismissed as though the Constitution also left these *powers* in the air so that the President could exercise them if he so desired. Would anyone suggest that the President by treaty can admit new states?

The location of Art. IV, § 3, as indicated by prior discussion, was principally a function of the Framers' concern with the claims of particular states to territory granted in their original charters. This was inextricably related to state-state and federal-state relations but it also directly involved the separation of powers between the Congress and the President; and insofar as United States versus States' "claims" were concerned, the Judiciary were also very much involved. This great concern with disposition of territory and the claims thereto caused Section 3 to be placed in Article IV, but the language of the clause—which also addresses *property,* which did not figure as importantly in the Framers' expressed concern relative to the grants under Royal charters, should not be narrowed as a result of its mere placement. The language of the clause is unequivocal: "The Congress *shall* have Power to dispose of . . . Property belonging to the United States."

This indicates that *exclusivity* of the powers in Art. IV, § 3, cl. 2, is vested in the *Congress* because if the President and the Senate, in the absence of any specific grant to that effect, were construed to possess the power, the Congress would thereby be excluded in many instances from exercising the power and the mandatory (*shall*) grant of the power to the Congress would be negated. It is recognized that some of the powers vested in Congress by Art. I, § 8 have been the subjects of treaties and that the mandatory character of that section may thereby have been obviated to some extent. That section, however, contains a great many designated powers covering a wide spectrum of legislative activity and it is recognizable that treaties might properly involve the same subjects *in a non-legislative manner.*

Art. IV, § 3, cl. 2, however, is very specific and limited. It refers only to territory and property (the claims also refer to territory and property). Thus, the specific nature and limited scope of the paragraph are reasons why the ratification procedure thus required should not be taken from Congress and obviated by self-executing treaties.

Such construction is also supported by the historical fact that the recognized intent of the Convention in this paragraph was to restrict the power to dispose of territory or property and this was the only place such intent is addressed. Had the convention intended to authorize the disposition of property as an incident of the treaty power, it would have been very easy to do so by merely inserting before the semi-colon in Art. IV, § 3, cl. 2: "(which may also be disposed of by treaty)." The fact that the disposition of *territory* clause was followed by a separate restriction of general import to the entire Constitution which critically implicated state-state and federal-state relations—while also implicating the distribution of powers among the three branches—should not cause the separate grant of broad power to dispose of territory and property to be construed narrowly.

The contention that the *placement* of the power with respect to property and territory in Art. IV is an indication of a limiting effect overlooks some other significant features of the content of the paragraph and its location. Art. IV is the first Article after the three first Articles which provided for the distribution of the powers of government between the Congress, the President, and the Judiciary. Art. IV is also the *last Article* in the Constitution that can be said to deal with the allocation of governmental powers: the remaining Articles provide for the manner of amendment (Art. V); recognize prior debts, provide for the supremacy of federal law and the oath of office (Art. VI); and provide for the manner of ratifying the Constitution (Art. VII). The Articles after IV are thus largely procedural and declaratory, and the Articles before IV are each *confined* to a separate department of government. Thus, Art. IV was the appropriate place, *after* those sections in Art. IV which placed certain limitations on the states, and before the *broad* guarantee by the whole "*United States*" of a Republican form of Government, for the Convention to make provision with respect to "Territory [and] other Property belonging to the United States" and further to add the very broad assurance applicable to all departments, the United States, and the States that "*nothing in this Constitution*" shall prejudice any claims of the United States or the states. *This is so because the Convention intended to restrict all three departments in some respect* and it would be contrary to the arrangement of the Articles to place such restriction in any of the first three Articles that were each devoted to a single department. Article IV, § 3 was the obvious place to insert its present contents and by such placement its obvious meaning was not restricted.

Art. IV covers four areas: (1) the disposition and regulation of United States territory; (2) the disposition and regulation of United States property; (3) claims of the United States; and (4) claims of any particular state. Actually these are all closely related. With respect to these areas of concern, the Convention provided that Congress should exercise the power to dispose and regulate territory and property, and then restricted the power so conferred by providing, in effect, that none of the powers conferred on the Congress, the President, or the Courts ("nothing in this Constitution") shall be construed to prejudice "any claims of the United States or of any particular State."

The claims so referred to were claims to "territory" in the West under Royal Charters which during the Convention were among the greatest concerns of some of the states. It is thus apparent that the most propitious place to restrict the power of the Congress, the President, and the Courts from dealing with this matter, was after the first three Articles and following the provision concerning Congress' power to dispose and regulate territory and property. It would not have been appropriate to place the restrictive language of Art. IV, § 3, cl. 2, in any of the first three Articles, as that would have suggested that the limiting language of the clause had some special relation to one particular branch of the federal government rather than to all three branches. Placing the provision *after* those Articles, and after the territory and property provision, gives the limitation greater force and clarity.[16] Therefore, the location of the territory and property clause in Art. IV does not in any way limit the effect of its plain language to confer those powers on Congress as it prescribes. Furthermore, coupling the regulatory and disposition powers over "Territory [and] other Property belonging to the United States," because the regulatory power is so completely legislative, is indicative of an intent to refer to the disposition power also in its legislative context.

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[16] The rules applicable to the construction of a statute also apply to the construction of a Constitution. *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937) (construing Minnesota Constitution); *Davis v. Synhorst*, 225 F.Supp. 689, 691 (S.D.Iowa 1964) (construing Iowa Constitution: "Rules applicable to statutory construction are similar to constitutional construction"). "The established rule is that *if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control.*" *Lodge 1858, American Federation of Government Employees v. Webb*, 188 U.S.App.D.C. — at —, 580 F.2d 496 at 510 (1978) (emphasis added), and cases cited at *id.*, at — —, n.31, 580 F.2d at 510–512, n.31. Here, the fact that Art. IV, § 3, cl. 2 was placed *after* Articles I, II, and III is entitled to some weight in construing the intendment of Art. IV; it points to the conclusion that the language of the property disposition clause is not concerned simply with state-state and state-federal relations.

III. ESTABLISHED STATE DEPARTMENT PROCEDURES FOR INTERNATIONAL AGREEMENTS

In bypassing the House of Representatives, the pending agreement does not conform to established procedures of the Department of State. These have been codified, set forth, and designated as the "Circular 175 Procedure." Department of State, 11 Foreign Affairs Manual § 700 *et seq.* (Oct. 25, 1974).

In its Circular 175 Procedure, the Department of State recognizes four types of International Agreements: Treaties which may be ratified by the Senate where to do so would not "*contravene the* United States Constitution . . ." (*Id.*, § 721.2(a), emphasis added). The Procedure also recognizes three types of agreements *other than* treaties:

> (1) *Agreements Pursuant to Treaty*
>
> The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, *whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress*;
>
> (2) *Agreements Pursuant to Legislation*
>
> The President may conclude an international agreement on the basis of existing legislation or *subject to legislation to be enacted by the Congress*; and
>
> (3) *Agreements Pursuant to the Constitutional Authority of the President*
>
> The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress *in the exercise of its constitutional authority.*

Department of State, 11 Foreign Affairs Manual § 721.2(a) (Oct. 25, 1974) (emphasis added).

The Circular 175 Procedure also provides in the "Considerations for Selecting Among Constitutionally Authorized Procedures" for international agreements that consideration shall be given to:

> c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
>
> d. Past U.S. practice as to similar agreements.

(*Id.*, § 721.3). Following these guidelines established by the Department of State, it is obvious that those portions of the treaty providing for the transfer of property to Panama are in effect outside the treaty power. This follows because the United States Constitution requires the additional approval of the House of Representatives, or the reference to the necessity for the enactment of subsequent legislation by Congress, because Art. IV, § 3, cl. 2 provides that "The *Congress* shall have Power to dispose of . . . Property belonging to the United States . . . ." (emphasis added). No party to this case questions that the treaty in its present form seeks to dispose of property belonging to the United States without approval by Congress.[17]

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[17] Indeed, it is beyond serious dispute that if the treaty becomes effective, the United States will dispose of property. Art. XIII of the Treaty provides: "The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon . . ." We may take judicial notice of the public dispute as to the nature of the interest this country presently possesses in the territory of the Canal Zone from its treaty right to act in perpetuity as though sovereign—whether it be a fee interest or a leasehold. In any event, the interest is a "property interest." Irrespective of the nature of this interest, this nation is definitely transferring a property interest in the fixtures and

This is true both as to the right to act as sovereign in the territory and as to our actual ownership of soil and fixtures which constitute property. The instant Panama Canal Treaty, insofar as it purports to dispose of the Canal territory and property, thus includes provisions of the second type, section 721.2(a)2, *supra*, which the State Department procedure correctly interprets the Constitution to provide that:

> The President may conclude . . . subject to legislation to be enacted by the Congress . . .

Thus, the property disposition portion of the treaty under the Constitution constitutes a severable international agreement that cannot constitutionally come into force unless the entire "Congress" approves that transfer.

Obviously Congress may not be required to approve other parts of the treaty. It should also be recognized that attempting to bypass the House of Representatives with the scheme which is framed as a "self-executing treaty" ignores that part of the Department of State Procedure which states that "[p]ast U.S. practice as to similar agreements" shall be followed. *Id.* § 721.3d. And, lest the *Per Curiam* opinion insist that its attempt to distinguish "executive agreements" was successful and authorizes the treaty procedure presently being followed, the "past practices" in Panama were in complete accordance with the views expressed in this opinion. *See* Part IV, *infra; but cf. Per Curiam* op., n.24.

IV. PAST U. S. PRACTICES INVOLVING SIMILAR AGREEMENTS WITH PANAMA

A. *Prior Panamanian Treaties*

The procedure to be used in conveying United States property to Panama confronted President Eisenhower in 1955 in the Eisenhower-Remon Treaty with the Republic of Panama which, *inter alia*, disposed of some "property of the United States" in Colon and Panama City. That Eisenhower-Remon Treaty provided in Art. V:

> The United States of America agrees that, *subject to the enactment of legislation by the Congress*, there shall be conveyed to the Republic of Panama free of cost all the right, title and interest held by the United States of America or its agencies in and to certain lands and improvements in territory under the jurisdiction of the Republic of Panama [etc.] . . . The lands and improvements referred to in the preceding sentence and the determinations by the United States of America respecting the same, *subject to the enactment of legislation by the Congress*, are designated and set forth in Item 2 of the Memorandum of Understandings Reached which bears the same date as this Treaty. The United States of America also agrees that, *subject to the enactment of legislation by the Congress*, there shall be conveyed to the Republic of Panama free of cost all its right, title and interest to the land and improvements in the area known as PAITILLA POINT and that effective with such conveyance the United States of America shall relinquish all the rights, power and authority granted to it in such area under the Convention signed November 18, 1903.

Treaty of Mutual Understanding and Cooperation Between the United States of America and the Republic of Panama, 6 U.S.T 2274, 2278–79 (Jan. 25, 1955) (emphasis added).

Thereafter, *Congress* enacted Public Law 85–223, 71 Stat. 509 (1957), which authorized such disposition.[18] This is the most sub-

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other improvements made on the real property. This includes the entire Panama Railroad, which the United States purchased as authorized by Congress (32 Stat. 481) and all the other real property that the United States purchased from the individual owners of the land, including the property and other interests of the French Canal Company for which the U.S. paid $40 million. (*See* 32 Stat. 481). All of this is property within the meaning of Art. IV. A substantial payment was also made to Columbia.

[18] Public Law 85–223 of August 30, 1957 provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
>
> TITLE I—CONVEYANCE OF PROPERTY TO THE REPUBLIC OF PANAMA AND FIS-

stantial example of United States past practices that exists. It also transferred land to Panama. The treaty itself called for *congressional* enactment. In my opinion, that same procedure is required here by the property disposition provision of the Constitution and by the Department of State's Circular 175 Procedure.

The Committee Report asserts that Articles VI and VII of the Eisenhower-Remon Treaty of 1955 is an example of a self-executing treaty which authorizes the transfer of territory or property belonging the United States to other nations without a "*prior* Congressional act authorizing such transfer." Committee Report at 68, 69 (emphasis added). Close examination does not support that conclusion. Naturally, enactment of an act *prior* to the treaty is not necessary—but the Committee Report suggests that an act prior to the *transfer* is not necessary; and the intent of the Committee Report, the Attorney General's Opinion, and the wording of the present Treaty provide for the transfer of the property the instant the instruments of ratification are exchanged, thereby completely eliminating the House of Representatives from any constitutional role in the transfer of United States property. Art. V of the 1955 treaty belies the Senate's and appellee's position.

CAL ADJUSTMENTS BY PANAMA CANAL COMPANY

Sec. 101. It is hereby declared to be the purpose of this title—

(1) to authorize and direct the fulfillment of those provisions of the Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama signed on January 25, 1955, and of the memorandum of understandings reached signed on the same date, which contemplate, subject to authorization by the Congress, the conveyance of various lands and improvements to the Republic of Panama, including, but not limited to, conveyance of the lands and improvements in, and simultaneous relinquishment of all right, power and authority in, the area known as Paitilla Point, and including the removal of the railway terminal operations of the Panama Canal Company from the city of Panama and the conveyance of the lands and improvements known as Panama Railroad Yard in the city of Panama; and

(2) to authorize and provide for the adjustments in the fiscal obligations of the Panama Canal Company necessitated by the aforesaid conveyances.

Sec. 102. (a) In accordance with and subject to the provisions of article V of the Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama signed on January 25, 1955, and item 2 of the memorandum of understandings reached signed on same date—

(1) the Secretary of State is authorized and directed to convey to the Republic of Panama free of cost all the right, title, and interest held by the United States of America or its agencies in and to the land and improvements in the area known as Paitilla Point and in the areas designated in paragraphs 1, 2, and 3 of paragraph (a) of said item 2; and

(2) the Panama Canal Company is authorized and directed to remove its operations and withdraw from the other lands and improvements designated in said item 2, and to convey to the Republic of Panama free of cost all the right, title, and interest held by the Panama Canal Company and the United States of America in and to said other lands and improvements.

(b) The market value of the property of the Panama Canal Company conveyed under this directive or by operation of articles VI or VII of the treaty and the net capital loss, if any, as established by the Panama Canal Company and approved by the Director of the Bureau of the Budget, sustained in the disposal, relocation, or realization of any facility or other property of the Panama Canal Company rendered excess, wholly or in part, by operation of articles V or XII of the treaty or items 2, 6, 9, or 10 of the memorandum of understandings reached shall be treated as extraordinary expenditures and losses incurred through directives based on national policy and not related to the operations of the corporation, within the meaning of section 246(d) of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (ch. 706, 62 Stat. 1075). The market value of Canal Zone Government property conveyed under this directive shall be removed from the capital investment of the United States in the Canal Zone Government without charge to the costs of operation of that agency. There are hereby authorized to be appropriated such amounts as may be required for the necessary replacement of property or facilities of the Panama Canal Company or Canal Zone Government conveyed or rendered excess as the result of the treaty or memorandum, such amounts to be charged to the Panama Canal Company or the Canal Zone Government, respectively.

Approved August 30, 1957. (71 Stat. 509)

And the two provisions in Articles VI and VII only related to minor boundary matters. Art. VI[19] concerned the modification of a boundary line between the City of Colon and the Canal Zone; this article replaced Art. V of the Boundary Convention of September 2, 1914[20] and modified Art. VIII of the Hull-Alfaro Treaty, which had been signed on March 2, 1936.[21] Art. VII concerned a boundary modification near Manzanillo Island.[22]

The asserted "self-executing" nature of Articles VI and VII of the 1955 treaty therefore do not provide precedential authority for disposing of the Panama Canal property without congressional approval. First, rectification of boundaries is a distinct matter from the disposition of the straggering amount of property in question here.[23] Boundary rectification ordinarily involves a dispute about which country owns the property; the subsequent agreement is more like a disposition of *claims* than of property, for the question of whether there even exists "United States property" is the entire matter in dispute.[24]

Second, in comparing the amount of property allegedly disposed of by Articles VI and VII to the amount being disposed in the present treaties, it is clear that the 1955 disposition, in relative terms, was even less than *de minimus.* Third, and most significantly, *Congress did approve Articles VI and VII in its 1957 statute.*[25] Section 102(b) of the statute in its last line "authorized to be appropriated such amounts as may be required for the necessary replacement of property or facilities . . . conveyed or rendered excess as the result of the treaty or memorandum . . . ." Unlike Section 102(a) which only addressed the matters contained in Art. V of the treaty, Section 102(b) addressed all *three* articles—V, VI and VII—and the authorization of appropriations for replacement of conveyed property constituted approval by Congress of the content of Articles VI and VII.

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[19] 6 U.S.T. at 2279–85.

[20] 38 Stat. 1900.

[21] The treaty is reprinted at 84 Cong.Rec. 9825–33 (1939).

[22] 6 U.S.T. at 2285.

[23] The *per curiam* opinion at notes 22–23 and the accompanying text addresses the boundary rectification point, and concludes that whether there is a dispute about the property or territory has nothing to do with whether the President can dispose of the same. This, in my opinion, is not correct: (1) the prior practices in this *unique area* are relevant, as the Circular 175 Procedure provides; (2) a bona fide boundary dispute is clearly not the same thing as disposing of our undisputed property in the Panama Canal. The point that the Western lands were the subject of conflicting claims, which causes the majority to conclude that status has no bearing on whether congressional enactment is required to convey land, is not analogous: it is not so much the status of the land itself that is crucial but the nature of the dispute and its relation to that status—that is, in all prior boundary settlements which appellee contends involved a cession, the dispute concerned claims of the grantor and grantee, and the settlement was of those claims. A dispute between two states, or between two private individuals, over a tract does not, by itself, give the land a peculiar status that removes it from the Art. IV requirement; thus, land that is subject to competing claims of two states of the United States would still require an act of Congress for conveyance to a foreign country.

Note 23 of the *per curiam* opinion asserts difficulty in understanding how the validity of using the treaty process should in any way depend upon whether the nation to whom the land is conveyed previously "claimed" the land. The explanation is not difficult but the statement of the *per curiam* opinion involves a false assumption, *i. e.*, that the property which the treaty recognizes as belonging to a prior claimant would be "conveyed" by the treaty. To so state is an inaccurate description, particularly of those treaties in the early days to which the *per curiam* opinion refers at — n.21 of 188 U.S.App.D.C., at 1063 n.21 of 580 F.2d, where there was considerable ignorance of the territory involved. Since, for instance, Spain claimed the western lands to the 42nd parallel, the fact of their claim, based as it was on the recognized right of discovery, some minimal exploration in the most far reaching regions and very minor settlement, when that claim is recognized in a treaty by the United States it is almost impossible to conclude in view of our negligible exploration or settlement of the fringes of the Spanish claim that the United States was actually disposing of territory or property belonging to it. What rights we did possess in the eastern area flowed from the Louisiana Purchase from France of what had originally been territory claimed by Spain. Such situations are generally recognized as *not* being an alienation of territory but merely a recognition of the particular claim and a determination of the invalidity of the losing claim. *See* n.24. It follows, that since we admitted our claim was inferior, that the treaty in that respect did not dispose of any territory or property belonging to the United States. Here, however, the title of the United States to the property in question is recognized by all.

[24] Writing in 1929, Willoughby stated: "In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation of portions of its own territory, for the fact that the treaties were assented to by the United States is itself evidence that it was conceded that the claim that the areas in question belong to the United States was unfounded. *There has been no instance in which territory, indisputably be-*

However, even if Articles VI and VII did involve a disposition of property which Congress did not initially approve, it may be that those Articles were themselves unconstitutional. Even Congress' silent acquiescence in that small disposition—assuming that is what may have happened temporarily—cannot alter the proper constitutional procedures mandated under Art. IV of the United States Constitution for the transfer by the Panama Canal treaty of United States property of the staggering value here being disposed of.

It is also convincing that in 1932, in another transfer of property to Panama, the Government considered it to be necessary to obtain prior specific congressional authorization even for a *minor* disposition of property from the Canal Zone to the Republic of Panama. Public Law No. 117, 47 Stat. 145 (May 3, 1932), *authorized* the Secretary of State to effect with the Republic of Panama a modification of the boundary line.[26] This slight alienation was not a

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longing to the United States, has been alienated to another power." 1 W. Willoughby, The Constitutional Law of the United States 572 (2d ed. 1929) (emphasis added).

Crandall writes that resolutions were introduced in the House in 1820 following the Florida treaty of 1819, which would have asserted that no treaty purporting to alienate any portion of the territory belonging to the United States could be valid without the concurrence of Congress, but no vote was taken on the matter. In the debates on the resolution, Mr. Clay, who introduced the resolution, stated that a treaty could fix the boundaries of the United States without the concurrence of Congress "when the fixation of the limits simply was the object. . . . in all these cases, the treaty-making power merely reduces to certainty that which was before unascertained. It announces the fact; it proclaims in a tangible form the existence of the boundary; it does not make a new boundary; it asserts only where the new boundary was. But it cannot under color of fixing a boundary previously existing, though not in fact marked, undertake to cede away, without the concurrence of Congress, whole provinces." He stated that if the subject was mixed, *i. e.,* partly cession and partly fixing a boundary, the consent of Congress was necessary. Mr. Clay believed that the Florida treaty was more than a boundary determination.

Mr. Lowndes, of South Carolina, took a different position and contended there could be no adjustment of a claim to a boundary without some cession of supposed right by one or the other party. Mr. Anderson, of Kentucky, believed that the treaty power must permit boundary settlements: "Its frequent operation on the settlement of differences of this kind, must have been contemplated by the Convention; and it could never have been intended, that, in a general grant of power, it should be construed not to apply to cases, which had been invariably, in all countries, the subjects of its operation."

Boundary rectification is not an example of cession of territory. In addition to being an adjustment of claims, it is supported by *prior practices,* as Mr. Anderson points out: the prior practice of boundary rectification involves a matter different from the wholesale relinquishment of large areas of undisputed territory. S. Crandall, Treaties, Their Making and Enforcement 227–29 (1916).

[25] *See* note 17 *supra* § 102(b).

[26] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That with respect to that parcel of land in the Panama Canal Zone known as the Paitilla Point Military Reservation, title to which was acquired by the Government of the United States under the conventions concluded on November 18, 1903, and September 2, 1914, between the United States and Panama, the Secretary of State be, and he is hereby, authorized and empowered to effect with the Republic of Panama a modification of the boundary line between the Panama Canal Zone and the Republic of Panama so that such line shall then run as follows: [Property description]

Sec. 2. Nothing contained in this Act shall be construed to authorize the Secretary of boundary correction but was in fact a cession of land made necessary by the requirements of international law with respect to embassies.[27]

During World War II, there were discussions between Panama and the United States concerning disposition of bases and the transfer of waterworks and railroad lots. On May 18, 1942, an agreement on the lease of defense sites was made between the two countries.[28] A more significant agreement was reached that same day,[29] which, based upon an exchange of notes, provided:

> *When the authority of the Congress of the United States shall have been obtained therefor*, the Government of the United States will transfer to the Government of the Republic of Panama free of cost all of its rights, title and interest in the system of sewers and waterworks in the cities of Panama and Colon.

59 Stat. at 1289 (emphasis added). The agreement also provided:

> *The President will seek the authority of the Congress of the United States* to transfer to the Republic of Panama free of cost all of its rights, title and interest to the lands belonging to or of which the Panama Railroad Company now has usufruct in the cities of Panama and Colon which are not currently or prospectively needed for the maintenance, operation, sanitation and protection of the Panama Canal, or of its auxiliary works, or for the operation of the Panama Railroad.

59 Stat. at 1290 (emphasis added). These agreements thus *recognized the constitutional necessity for Congress to approve the disposition of United States property*. On May 3, 1943, Congress enacted the legislation necessary to effectuate the transfer. Public Law No. 48, 57 Stat. 74 (May 3, 1943).[30] These are thus *not* examples of self-executing transfers by treaty.

State to convey or to surrender to the Government of Panama the title which the Government of the United States now holds in that parcel of land which may be detached from the Panama Canal Zone by virtue of the provisions of section 1 of this Act.

Sec. 3. No civil or criminal case that may be pending in the courts of the Panama Canal Zone at the time this Act shall become effective shall be affected thereby, either as to its present status or as to future proceedings, including final judgment or disposition.

Approved, May 3, 1932.

[27] This boundary change was not a boundary dispute where there would be no cession. *See* note 24 *supra*. Instead, the United States wanted to build a new legation in Panama, and the chosen site was in the Zone. A legation could not be built on United States territory; hence, the property was alienated to Panama, which then retransferred the property back to the United States' jurisdiction, but with diplomatic immunity and immunity from local jurisdiction for use as a legation. 75 Cong.Rec. 4652–57 (1932).

[28] Agreement for the Lease of Defense Sites in the Republic of Panama, 57 Stat. 1232 (May 18, 1942).

[29] Agreement between the United States of America and Panama respecting general relations, 59 Stat. 1289 (May 18, 1942).

[30] *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and is hereby, authorized to transfer to the Republic of Panama all of the right, title, and interest of the United States in and to water and sewerage systems installed by the United States in the cities of Panama and Colon: *Provided, however*, That pending the establishment of an independent water-supply system, and so long as the Republic of Panama desires to utilize a supply of water from the Canal Zone, it shall pay quarterly to the appropriate Canal Zone authorities the rate of B/0.09 per one thousand gallons or such other reasonable rate as may be agreed upon by both Governments: *And provided further*, That the turning over to the Government of the Republic of Panama of the physical properties of the water and sewerage systems and the administration thereof, including the collection of the water rates, does not in any way modify the existing arrangement in respect to responsibility for the public health services of the cities of Panama and Colon as specified in the second paragraph of article VII of the Convention between the United States of America and Panama, signed at Washington, November 18, 1903.

Sec. 2. The Panama Railroad Company is hereby authorized to convey to the Republic of Panama, in whole or in part, all of its right, title, and interest in and to so much of the lands of the Panama Railroad Company located in the cities of Panama and Colon as, in the opinion of the Secretary of War, are no longer needed for the operation of the Pana-

Appellee also cites the "Convention of May 24, 1950 [with the Republic of Panama] for Change in the Boundary and the Grant of Certain Corridors, 6 U.S.T. 462," Appellee's Supplemental Memorandum, March 17, 1978, at 3, as an example of a treaty which demonstrates "that under well established historical practice treaties with foreign countries have ceded rights to property of the United States," *id.*, at 4. Reference is also made to Art. VI in the 1955 treaty with respect to "a small portion of the Colon and of the Colon corridor." *Id.*, at 4.

The Convention of August 9, 1950 is entitled "Colon Corridor and Certain Other Corridors Through the Canal Zone." 6 U.S.T. 461. In Art. II thereof *the Republic of Panama transferred* certain tracts of land from the city of Colon to the Canal Zone as a boundary change and provided that said property would be incorporated "to form part of the Canal Zone in the same manner as though [said lands] had been included within the grants contained in the [boundary] convention of November 18, 1903 . . . " 6 U.S.T. 465.

Thereafter in Art. III the United States transferred to the Republic of Panama "*jurisdiction* over the corridor" (emphasis added). This included the Colon corridor and another corridor through a small portion of the Canal Zone. The purpose of these transfers was so that "the city of Colon may enjoy direct means of land communication under Panamanian jurisdiction with other territory under jurisdiction of the Republic of Panama . . . " 6 U.S.T. 465. This was something less than a transfer of "territory or property" because Art. V of the convention provided that the provisions previously referred to [conferring *jurisdiction* over corridors] "shall not affect the rights and obligations of either of the two high contracting parties under the treaties or other international agreements now in force between the two countries, nor be considered as a limitation, definition, restriction or restrictive interpretation of such rights and obligations . . . " 6 U.S.T. 469.

The reference to prior "treaties or other international agreements now in force between the two countries . . . " included reference to the treaty of November 18, 1903 which provides that the grants to the United States by the Republic of Panama should not "interfere with the rights of way over the public roads passing through the said Zone . . . unless said rights of way . . . shall conflict with rights . . . granted to the United States." Art. VI, 33 Stat. 2235. Thus, there being no conflict with United States' rights, the convention of 1950 insofar as it related to highway corridors was dealing with a subject in which the Republic of Panama had *reserved* certain rights from the earliest treaty. Therefore, the recognition of Panama's "*jurisdiction*" over a highway corri-

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ma Railroad or for the operation, maintenance, sanitation, or defense of the Panama Canal: *Provided*, That any such instruments of conveyance shall contain a provision under which the Panama Railroad Company and any of its successors in interest agrees to fully protect the Government of the United States against any claims for damages or losses heretofore or hereafter incurred by any lessee of any of the lands covered by such conveyance. The authority conferred by this section shall not be exercised after June 30, 1944.

(a) Any conveyance of any land in pursuance of the authority contained herein shall be deemed to release any and all reversionary rights of the United States in said property.

(b) The provisions of the joint resolution entitled "Joint resolution authorizing the disposal of certain lands held by the Panama Railroad Company on Manzanillo Island, Republic of Panama," approved July 10, 1937, so far as they may conflict with the provisions of this joint resolution, are hereby modified accordingly.

Sec. 3. There is hereby authorized to be appropriated out of any moneys in the Treasury, not otherwise appropriated, a sum not to exceed $2,700,000, to enable the Secretary of the Treasury to pay to the Republic of Panama an amount equivalent to the principal and interest paid by that government on account of the credit of $2,500,000 made available to it by the Export-Import Bank for the construction of Panama's share of the Chorrera-Rio Hato Highway, and to pay to the Export-Import Bank an amount sufficient to liquidate the remaining obligation of the Republic of Panama to that bank on account of the aforesaid credit.

Approved May 3, 1943.

dor, which the agreement provided the United States had a right to use, and which did not take any land out of the Canal Zone proper, is not an instance where property owned by the United States was disposed of. *From the inception of the 1903 treaty, the United States had never possessed the right to "interfere with the rights of way over the public roads passing through* the said zone" (Art. VI). The necessity for appellee to attempt to rely upon such unsupporting authority is an indication of the great weakness of his position.

The present case boils down to this: President Eisenhower in 1955 recognized his constitutional obligation to obtain authority from Congress to transfer a *depot* of the Panama Railroad to the Republic of Panama; but the appellee presently contends he does not need congressional approval to transfer the *entire Panama Railroad* and very substantial amounts of other property to the same party, and to reduce the entire interest of the United States in the colossal Panama Canal to a 21-year partnership with Panama solely in its operation.

With respect to prior treaties and agreements between the United States and Panama, the "past U.S. practice," as demonstrated above, has recognized the necessity of approval by *Congress* and has sought such approval by legislation whenever *United States territory or property was conveyed to Panama.* Heretofore *every* transfer of United States' property to Panama has been authorized in advance or subsequently ratified by action of *Congress.*[31] The proposed agreement flies in the face of all these "past U.S. practices" and this violates established procedures of the State Department.

B. *Senate Debate in 1943 over Transfer of United States Property to Panama.*

The Joint Resolution of 1943 which transferred the waterworks and some of the property of the Panama Railroad to Panama (57 Stat. 74) was the subject of debate in the Senate in which some Senators expressed the opinion that the disposition should have been made by Treaty, and not by resolution of both Houses (*see* 88 Cong. Rec. 9320 *et seq.*). The scope of Art. IV was discussed at considerable length. Senator Hiram Johnson of California argued that the resolution was dealing with "property of the United States" and that the Senate should "perform its constitutional function" by disposing of it by treaty. However, his views did not prevail against those pointing to the specific character of the language in Art. IV, § 3, cl. 2.

On December 3, 1942, Senator Connally of Texas, Chairman of the Senate Foreign Relations Committee, discussed the pending Senate Joint Resolution 162, which was to similar effect as the House Joint Resolution which eventually authorized the transfer. He quickly addressed the sentiment that a treaty should be the implementation instead of a Joint Resolution by the Congress:

> Mr. President, I am and have been and in the future shall continue to be ardent in my maintenance of the integrity and the rights of the Senate of the United States in all its proper functions as a branch of the Government; but the matter covered by the joint resolution has to be passed by the Congress sooner or later in some form, for the simple reason that under the Constitution of the United States, Congress alone can vest title to property which belongs to the United States. The Constitution itself confers on Congress specific authority to transfer territory or lands belonging to the United States. *So, if we had a formal treaty before us and if it should be ratified, it still would be necessary for the Congress to pass an act vesting in the Republic of Panama the title to the particular tracts of land; because "the Congress" means both bodies.*

The House of Representatives has a right to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise.

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[31] Appellee's claims with respect to the minor matters referred to in Articles VI and VII of the 1955 Eisenhower-Remon Treaty are answered at ——— of 188 U.S.App.D.C., at 1082–1084 of 580 F.2d, *supra.*

88 Cong.Rec. 9267 (Dec. 3, 1942) (emphasis added). Senator Vandenberg of Michigan then intervened to inquire why the disposition of the waterworks and some property owned by the Panama Railroad could not be by executive agreement. They became somewhat sidetracked, whereupon Senator O'Mahoney of Wyoming queried why the disposition should not be by treaty? In the course of responding, Senator Connally stated:

> Mr. President, I referred earlier in my remarks to the constitutional requirement that Congress shall exercise consent in the case of the disposal of real estate. Article IV, section 3, of the Constitution, among other things, provides:
>
> The Congress shall have authority to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.
>
> So that, *in any event, it would be necessary to have congressional action even though there were a treaty. In this case it would be necessary to have congressional action parting with title to these properties.*

88 Cong.Rec. 9269 (Dec. 3, 1942) (emphasis added). In response to a query from Senator Taft of Ohio, Senator Connally made the point that a treaty could be substituted for the joint resolution *if* there was subsequent enacting legislation:

> Mr. TAFT. I am somewhat hazy on the subject of why an executive agreement should be confirmed by legislation instead of being made the subject of a treaty. I myself have had considerable difficulty in drawing the line. It does not seem to me that the mere fact that some legislation is necessary to implement this particular agreement necessarily excuses it from being made the subject of a treaty.
>
> Mr. CONNALLY. As a legal proposition I think the Senator from Ohio is correct. The mere fact that legislation is required does not necessarily mean that we could not first, by means of a treaty, assume the obligations, *and then carry out the obligations by the enactment of legislation.* I will say very frankly to the Senator from Ohio—I do not think he was present awhile ago when we discussed that question—that the Senator from Texas is not prepared with the accuracy of a civil engineer to draw the boundary line between what can be done by executive agreement and what can be done by a treaty.

88 Cong.Rec. 9270 (Dec. 3, 1942). (Emphasis added).

The next day, Senator Johnson of California spoke against the resolution, as described above. Senator Tunnell responded:

> There are different methods, apparently, by which questions of international moment are met. This is not a new question. Sometimes those who have objected to the course of the Executive have been more fortunate than those who are now making this objection. In this instance the Constitution specifically provides for this method. In article IV, section 3, second paragraph, I find this language:
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.
>
> It seems to me that if any other method than that of transfer by Congress had been attempted, we should have been met by the objection that Congress was the only power by which this territory or this property could be disposed of. *There is no other method or authority to dispose of property of the Nation than that which is reposed in the Congress.*

88 Cong.Rec. 9322 (Dec. 4, 1942) (emphasis added). The Joint Resolution passed 40 to 29. 88 Cong.Rec. 9320 (Dec. 4, 1942).

It cannot be said from this that the procedure there adopted by the President and *the Congress* to transfer property to Panama has the same effect as a binding judicial precedent. It must be recognized, however, that the Senate did understand the nature and importance of the issue and its constitutional—and political—ramifications; and in an instance where United States property of much less value than is here involved was being transferred, the Senate did decide that the proper procedure called for legislative action of the *Congress*. In our review of past practices, it is also important that this was another case involving the transfer of land to Panama.

V. THE HISTORY OF THE TREATY CLAUSE IN THE CONSTITUTIONAL CONVENTION AND ITS RELATION TO THE DISPOSITION OF PROPERTY BELONGING TO THE UNITED STATES

Appellee contends that the Constitutional Convention

> adopted a proposal that required two-thirds of the Senate to concur in all treaties, *including peace treaties involving cessions of territory*. 2 Farrand, *supra*, at 544, 549 . . . [which] demonstrate[s] that the framers of the Constitution contemplated the transfer of United States territory and property by treaty.

Appellee Br. at 11 (emphasis added). No such proposal was finally adopted. On September 4, 1787 the working draft of the proposed Constitution provided:

> Sect. 4. The President by and with the advice and consent of the Senate, shall have power to make treaties . . .
> But no Treaty shall be made without the consent of two-thirds of the Members present.

2 Farrand, The Records of the Federal Convention of 1787, 495 (rev. ed. 1929) (hereafter "Farrand").

On September 7, the words "(except Treaties of Peace)" were added after the word "Treaty."[32] 2 Farrand, 533. Under this amendment, a *majority* vote of the Senate could have ratified a *peace treaty*. Thereupon a motion was made to add the following amendment:

> But no Treaty of Peace shall be entered into, whereby the United States shall be deprived of any of their present Territory or rights without the concurrence of two-thirds of the members of the Senate present.

2 Farrand, 534. This amendment was *defeated* by adjournment, 2 Farrand 534, 543, and was never offered again.

The very next day, as the first order of business, the convention *struck* the previously adopted amendment, *i. e.,* "(except Treaties of Peace)" from then section 4 by a vote of eight states to three. 2 Farrand 544, 548–549. Thus, even that clause never became part of the treaty provision.

Thus, the convention eventually rejected the proposal that peace treaties should be ratified by a majority vote of the Senate, and by adjourning, it also rejected the proposal to add a specific provision that treaties of peace *transferring United States Territory or rights* would require a two-thirds vote if other peace treaties could be ratified by majority vote. Appellee's brief and argument overlook these facts.

The mere offering, consideration, and rejection of the amendment as to United States "territory and rights" does not support appellee's claim "that the framers of the Constitution contemplated *the transfer of United States territory and property by treaty.*"[33] Appellee Br. at 11 (emphasis added). Had the amendment with respect to the "territory and rights" become part of the treaty clause of the Constitution, appellee's interpretation would have been correct, but that amendment, contrary to appellee's representation, never even reached the voting stage. 2 Farrand, 534, 543. Thus, the convention proceedings with respect to that amendment do not support appellee's present contention, and the temporary inclusion of peace treaties does not support an interpretation that the naked treaty power which was eventually voted included the right to cede territory. Even if a "Peace Treaty" could, they are a peculiar breed with their own characteristics, and insofar as they cede property they are usually recognizing that the property has already passed from their domain. The conclusive answer to that argument, however, is that we are not here concerned with a "Peace Treaty."

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[32] 2 Farrand 533 states: "which passed in the affirmative." *See also, id.*, 541.

[33] None of the debates or amendments at the convention referred to United States "property." The concern of the delegates was with territorial and other rights, such as navigational rights on rivers and offshore fishing rights and the rights of sovereignty over such land and areas. Property rights, such as the United States owns in the physical property of the Panama Railroad and the Panama Canal which were purchased or constructed on land that was purchased, were not debated in the convention. The clarity of the reference to "property" eliminated need for debate.

Doubtlessly, the two members who offered the amendment with respect to "territory and rights" were of the view that treaties could transfer territory and rights of the United States (to be) and of the particular states; but these amendments were defeated and there is no indication that the movers (Williamson and Spaight, 2 Farrand 543) took cognizance of the provision of the present Art. IV, § 3, cl. 2, which at that time was in its present form, except for its reference to "Legislature" which was later changed to "Congress" (2 Farrand 459, 466).

In this matter, however, we should be guided more by the *action* of the Convention as a whole and by the interpretation evident from *rejection* of the proposed amendment by a substantial majority of states. In this inquiry there is nothing in the convention proceedings to refute the conclusion that the majority rejected the amendment because it interpreted the then-existing broader language that became Art. IV, § 3, cl. 2 as providing better protection for their interests through *Congress* than would have been possible through the defeated addendum to the treaty clause. In believing they had guaranteed that no territory or property belonging to the United States could be disposed of except by *the Congress* the Framers of the Constitution were concerned lest the President and 10 Senators (two-thirds of a bare quorum), possibly from only 5 states, would be empowered to dispose of United States territory and property. This was a real concern because the Senators under the Constitution were to be "chosen by the [state] Legislature" and were to be representatives of the states, whereas the "House of Representatives [was] . . . chosen . . . by the People," and was considered to be their direct representatives—much like the House of Commons in England. In those days transportation from the outlying states of the newly formed nation was also slow, uncertain and difficult and there was always the possibility that the Senate might be meeting with short quorums. Hence the Framers were concerned that the assured broader representation of the House should be reflected whenever the President sought to dispose of Government territory or property particularly to foreign powers. The House of Representatives was also apportioned equally throughout the United States on the basis of population. Despite the Seventeenth Amendment providing for direct election of Senators, they are still elected from states without any apportionment based on population and the language of Art. IV, § 3, cl. 2, has not been changed or altered in any respect. Therefore, the territorial and property disposition provision retains the same intent as when it was originally composed by Gouverneur Morris and adopted by the Constitutional Convention—11 states to 1.

Any member who relied on what became the property disposition clause of Art. IV would have voted for adjournment on September 7 against the territorial amendment discussed above, and would have had no reluctance to vote for the Constitution in the form in which it was submitted with Art. IV, § 3, cl. 2 as at present.[34]

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[34] In other words, appellee's argument reasons as follows: At the outset, the draft of section 4 under consideration said that a treaty required for approval a two-thirds vote of the Senate. A majority thought that peace treaties were good, and therefore adopted an amendment excepting peace treaties from the two-thirds requirement (and thereby requiring only a majority). But at least two of the Framers thought that this authorized the transfer of territory with only a majority vote, and therefore sought to except peace treaties that transferred territory from the peace treaty exception (which would require a two-thirds vote to transfer property).

The majority also refers to the history of the state ratifying conventions, and concludes therefrom that the states—in addition to the Framers—were satisfied that a two-thirds requirement in the Senate, rather than full congressional approval, served as an adequate check on the alienation of United States territory.

Such a broad conclusion cannot be drawn from the history of the state conventions. Typical of the majority's position is reliance on a proposed amendment at the Virginia ratifying convention, which read in full as follows:

> [N]o commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

3 Elliot's Debates in the Several State Conventions on the Adoption of the Federal Convention 660 (1907). Irrespective of the statements of the participants of the Virginia convention, who may well have been laboring under the mistaken pretense that Art. VI was not operative in this area or who may not have even thought about that section at all, a wholly permissible conclusion to be drawn from the *rejection* of this amendment was that the provision in Art. IV for a vote of the *full Congress* for disposition of territory or property was an adequate safeguard. The statements of parties who suggested such amendments, in their honest but mistaken fear that the treaty power alone allowed the disposition of territory or property in circumstances such as are here present, and then had their amendment defeated, do not constitute an authoritative interpretation of the scope of Art. II.

VI. ELEVEN PRIOR TREATIES

Appellee's brief and the Committee Report [35] both refer to eleven treaties supplied by the Department of State and argue that such treaties were couched in self-executing terms and constitute examples of the transfer of United States territory or property to other nations, and in some instances to individuals, *without a prior congressional act authorizing such transfer*. It is further asserted that these instances support the contention that Art. IV, § 3, cl. 2 of the Constitution permits the President through a treaty to dispose of property belonging to the United States without approval of "the Congress." [36] We examine each of these treaties for verification of the asserted interpretation; and we find little or no support therefor.

A. *Indian Treaties*

1. *The Treaty with the Cherokee Nation of December 29, 1835 (78 Stat. 478).*—This treaty was *preceded* by the Act of May 28, 1830, by which Congress authorized the exchange of western lands for the Cherokee's eastern lands in connection with their removal to lands west of the Mississippi River. However, the 1835 treaty, in some re-

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Eventually all amendments were defeated, and a two-thirds vote was required for all treaties. Appellee reasons that since the two Framers above "got their way," the Convention believed that territory could be transferred by treaty without an Act of Congress. This does not necessarily follow, as the text demonstrates. It may have been that when the two Framers proposed their amendment, a substantial number of the convention realized that the amendment could well pass, and that that would create a conflict—or perhaps erase—the action taken earlier, namely Art. IV, sec. 3, cl. 2, which allowed only *Congress* to dispose of property and territory. Faced with this prospect, a majority might have decided to abandon the peace treaty exception altogether, so as to preserve the language in Art. IV without compromise. Their reconsideration of the peace treaty exception, and its eventual rejection, is consistent with this interpretation.

[35] Committee Report, at 68.

[36] *Id.*

spects, exceeded the statutory authorization as to the lands that were to be transferred, and citizens who took title to some lands subsequently transferred from the Indians were subjected to attacks upon their title. *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 21 L.Ed. 523 (1872), involved such a controversy. The Court held, in effect, that those who received land from the Indians acquired good title because Congress, by appropriating some four-and-one-half million dollars to carry out the treaty, had in effect ratified the *ultra vires* acts of the treaty negotiators. In so ruling, the Court's opinion recognized the issue as to whether a treaty could convey lands belonging to the United States, but then stated:

> It is not necessary to decide the question in this case, [whether the treaty conveyed title without Congressional approval] as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid.

84 U.S. (17 Wall.) at 247.[37] Thus, far from holding that a treaty can transfer property

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[37] At 84 U.S. (17 Wall.) 247, the Court stated:

> [T]here are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.

The cases cited in the footnote to this statement do not support the argument that the President by Treaty is empowered to transfer the Panama Canal and Railroad. The cases cited are:

1. *Wilson v. Wall,* 73 U.S. (6 Wall.) 83, 89, 18 L.Ed. 727 (1867). This case is only authoritative on part of the *Holden* statement, and has no significance for the transfer of the Panama Canal and Railroad. A treaty between the United States and the Choctaw Indian Tribe entitled each Choctaw head of family to a section of land. The treaty was signed in 1830; in 1834, Wall, a Choctaw, entered into an agreement with Wilson to transfer the land to him as soon as he obtained it. He made the transfer in 1836, and was paid $750. Wall's children then sued Wilson for the land, alleging a constructive trust in their favor. Wilson claimed a bona fide purchaser defense. The Alabama Supreme Court held for plaintiffs, and the Supreme Court reversed.

Congress became involved in 1841; complaints concerning the Indians losing the land in the manner above caused Congress to enact a statute clarifying part of the treaty. The Court said what Congress did would not affect the case:

> Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. The legislature may prescribe to the Executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act.

73 U.S. (6 Wall.) at 89. Thus, this case merely holds that a subsequent act of Congress cannot affect titles that were valid when conveyed. It does not control or even offer any assistance on the facts in the instant case.

2. *American Insurance Co. v. 356 Bales of Cotton,* 26 U.S. (1 Pet.) 511, 542, 7 L.Ed. 242 (1828), involved the validity of the judgment of a Territorial Court which ordered the purchaser of cotton salvaged from a shipwreck off Key West to make restitution to the insurer. The court held in an opinion by Chief Justice Marshall that the treaty with Spain ceded Florida to the United States and thereafter *Congress* was authorized to provide for the creation of territorial courts with admiralty jurisdiction. This upheld the establishment of a territorial court by the territorial legislature. The Court simply noted that *Congress* passed an act authorizing a Territorial Government, and that such government was thereby authorized to establish the court in question.

3. *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829): This case involved a dispute over land that was located in territory acquired by the Louisiana Purchase (the Treaty of Paris, 1803). Plaintiffs claimed under a grant from the Spanish Governor in 1804; defendants answered that the land had been ceded to the United States by France in 1803, and that plaintiffs grant was void. The dismissal of the petition was affirmed by the Supreme Court. First, the Court said that the "Legislature" had undertaken certain acts amounting to a construction of the 1803 Treaty which the court could not oppose. The Acts were passed by Congress, and concerned rules and regulations for the management of the new territories.

> A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature. [*i. e.,* Congress].

27 U.S. (2 Pet.) at 309.

Part of the case also involved the construction of Art. VI of the 1819 Treaty with Spain belonging to the United States without Congress, the case recognizes the requirement of congressional authorization and holds that when land is transferred in a

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which provided in effect that grants from Spain prior to the Treaty would be respected by the United States, *i. e.*, "ratified and confirmed." The question was whether the treaty was self-executing with respect to the grants, or whether an Act of *Congress* was necessary to "ratify and confirm" and thereby respect the grants. The Court said the *Legislature* must act; that it had not done so here, and thus prior laws would be respected. The Court stated:

> A treaty is in its nature a contract between two nations, not a Legislative Act. . . .
> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, *whenever it operates of itself without the aid of any legislative provision.* But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and *the Legislature must execute the contract before it can become a rule for the court.*

27 U.S. (2 Pet.) at 314 (emphasis added). This is not inconsistent with the position that a legislative provision is necessary under Art. IV *to convey* property of the United States. This case is not authority for the proposition that Congress has no role; if anything, it tends the other way.

4. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1834). This case concerns a treaty with the Cherokees. Petitioner (a missionary) was a prisoner who claimed that the law under which he was convicted was void, being repugnant to the United States Constitution. The opinion stated:

> [The Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. The powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions . . . The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties . . .

This language of the case does not approach the issues raised by the attempt to transfer and convey the Panama Canal and Railroad and other United States property.

5. *Crews v. Burcham*, 66 U.S. (1 Black) 352, 17 L.Ed. 91 (1861) is another case involving a reservation of Indian lands. The decision holds that the reservation creates an equitable estate. The opinion does not discuss the authority or power of Congress.

6. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667 (1866): The issue here was whether land belonging to the Shawnees was taxable by a county government. It was held that so long as the "treaties and laws of Congress" protect the Indians, they are immune from the operation of state laws. This recognizes the authority of *treaties and Congress* in said matters. The scope and authority of Congress was not otherwise discussed.

7. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 9 L.Ed. 283 (1895) similarly does not control here. Mitchel and the United States both claimed certain land in Florida under deeds of conveyance. Mitchel's claims were based on deeds from Indian tribes, and the United States claims were asserted on the basis of the treaty with Spain. The issue was whose deed was superior. In stating the facts, the Court remarked:

> In taking possession of Florida pursuant to the treaty, and in establishing a government in and over it, Congress have acted on the same principles as those which were adopted by this court in the former cases. *In the Act of 1821, for carrying the treaty into execution, Congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property.*

34 U.S. (9 Pet.) at 736 (emphasis added). In so acting Congress was relying upon Art. IV, § 3, cl. 2, which was the source of its power to "*make all needful Rules and Regulations respecting the Territory* . . ." (Emphasis added). Thus, the power to make rules and regulations concerning the proper management of the new territories was recognized as existing in Congress, and since the power to dispose of United States property is subject to the same language of the Constitution, there is some support for concluding that such power was also vested exclusively in Congress. Of course, there are some inherent differences between the acquisition of property and the government of property after it is acquired; but we are not dealing here with a contemporaneous disposition of property that is being acquired, but instead are dealing with property that has belonged to the United States for a long time, some of it since 1903. So any reason for applying a different rule as to exclusivity is non-existent.

Thus there is no reason why *Congress* should not be recognized as possessing the exclusive power to dispose of Government property. In other words, if disposition of property is a concurrent power, the power in general must be concurrent with respect to *all aspects* of Art. IV, § 3, cl. 2. Since such power is *not* concurrent with respect to rules and regulations of treaty in excess of statutory authorization, the transfer may be legalized by a subsequent act of "Congress" which in some affirmative manner indicates approval of the otherwise *ultra vires* act.

2. *The Treaty of October 2, 1863 with the Red Lake and Pembina Bands of Chippewa Indians (13 Stat. 667).*—Appellee points to Art. IX of this treaty signed by President Lincoln as an alleged transfer of property not consented to by Congress. That article provided: "there shall be *set apart from the tract hereby ceded* [to the United States by the Bands of Chippewa Indians] a reservation of (640) six hundred and forty acres near the mouth of Thief River for the Chief 'Moose Dung' . . ." The validity of the reservation to Chief Moose Dung was involved in *Jones v. Meehan,* 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 (1899),[38] which considered the validity of a subsequent lease made by one who inherited from the chief. Appellee cites the court's decision upholding the lease for the rule that property of the United States may be transferred to individuals by treaty between the United States and Indian tribes *without any act of Congress* or any patent from the President. When the facts of this Indian treaty are analyzed, it is clear, however, that the authority of the case is limited to reservations of land made in treaties *between* the United States and Indian tribes, which were treated as being akin to nations. *See* following discussion of the Indian treaties.

3. *Summary.*—The early treaties with Indian tribes are *sui generis* as treaties. They are not treaties in the ordinary sense of the word as all have recognized since Congress in 1871 enacted a law prohibiting any "contract by treaty" with any Indian tribe or nations:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Act of March 3, 1871, 16 Stat. 566. Had Indian treaties been true treaties in the

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newly acquired territory, it should not be concurrent with respect to the other powers in the relevant paragraph.

8. *United States v. Brooks,* 51 U.S. (10 How.) 442, 13 L.Ed. 489 (1850), involved the construction of a supplemental article to a treaty with the Caddo Indians. It held that *Indian Lands reserved* to Indians by treaty were held by them in fee simple since they acquired perfect title by treaty. Since it involves land *reserved* for Indians, it is in the same category as the other Indian treaty cases and it does not affect this case.

9. *Doe v. Wilson,* 64 U.S. (23 How.) 457, 461, 16 L.Ed. 584 (1859), involved Indian lands, but contains no reference to the scope of Congress' authority to dispose of property. The decision holds the Indian was a tenant-in-common with the United States and that the deed of conveyance by the Indian, which he executed prior to selection of the lands, conveyed the interest he would have taken if living.

10. The last two cites are *Blair v. Pathkiller,* 2 Yerg. 407 (1830), and *Harris v. Doe,* 4 Blackf. 369 (1837). They are state cases.

Blair v. Pathkiller, a Tennessee decision, involved a claim of title and the effect of Indian Treaties and state statutes enacted before the adoption of the Constitution of the United States. The *reservation* of 640 acres to the head of each Indian family was held valid pursuant to treaties with the Cherokees of 1817 and 1819. The court pointed out that part of the consideration paid to the Cherokee Nation for its title to the land ceded was the reservation to the Indians of certain lands which were the subject of the litigation.

Harris v. Doe is an Indiana Supreme Court decision on an action in ejectment from land ceded by the Miami Indians by treaty to the United States and by the same treaty granted to Lafontaine and son, the predecessors in title of the defendant. The trial judge charged the jury that it could consider as evidence a special law of Congress as confirming the fee in the predecessor of the defendant. This decision is subject to the same infirmities as support for appellee's treaty contention as the other Indian Treaty cases and is additionally weakened by the fact that Congress did find it necessary to enact a law to confirm the title of one who claimed under a treaty.

[38] In the Supreme Court, Later-Secretary of State, Frank B. Kellogg, was a counsel on the brief of appellee and Cushman K. Davis, one of the Plenipotentiaries of the United States in the 1898 Treaty with Spain, argued the case.

constitutional sense *Congress* could not have prohibited the President from so contracting by treaty. While the Act took the form of providing that Indian tribes shall not be "acknowledged or recognized" as "independent," the statute clearly prohibited the President from negotiating treaties with any Indian tribe that was "independent." The Act was thus in form a clear restriction on the treaty power, but actually it recognized that the Indian treaties were something different than the treaties referred to in the Constitution.

They have special features that generally make them inapplicable as authority that a treaty can dispose of other types of United States property without an Act of Congress. This is true because generally the subject of the Indian treaties was land owned and occupied by the Indians, which the United States was buying or acquiring. The treaty "reserved" some of the land for the Indians. Thus, property of the United States was not *disposed* of by the treaty.

Attorney General Taney in an opinion on September 20, 1833 stated: "These reservations [of Indian land in treaties] are *excepted out of the grant made by the treaty and did not therefor pass by it.* Consequently the title remains *as it was before* the treaty, that is to say *the lands reserved are still held under the original title.*" 175 U.S. at 12, 20 S.Ct. at 5. Mr. Justice Nelson in *Gaines v. Michelson*, 50 U.S. (9 How.) 356, 13 L.Ed. 172 (1850), pointed out that in such transactions, "it was so much carved out of the territory ceded, and remained to the Indian occupant, *as he had never parted with it.* He [the Indian] holds strictly speaking *not under the treaty* of cession but under his original title confirmed by the government in the act of agreeing to the reservation." 50 U.S. (9 How.) at 365.

In the *Per Curiam* opinion a statement in *Jones v. Meehan, supra,* 175 U.S. at 12–14, 20 S.Ct. 1, is cited as authority that the Taney opinion and the decision in *Gaines v. Michelson, supra,* were "irreconcilable with later Supreme Court opinions . . ." (*Per Curiam*, n. 19). This may be explained by virtue of a change in the statute after *Jones v. Meehan, supra,* which eliminated the prohibition against individuals purchasing or leasing from any individual Indian. Act of June 30, 1834, c. 161, § 12, 4 Stat. 730.

But whether the treaty confirmed the Indian right or granted a new right is not dispositive of the question as to whether there was a disposition of territory or property belonging to the United States. Those treaties dwelt with territory and property and in doing so they dwelt with sovereignty over the territory and the right to individual patches of soil, as Chief Justice Marshall noted in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). They also in some instances involved disputed claims to both territory and soil. In settling on the tribes the reserved territory the sovereign rights of the respective parties were involved, but in the "reservation" of specific acreage of *soil* to individual Indians, different claims were involved and this phase of the agreements was more concerned with what might be termed "property." It is clear that at one time such "reservations" were considered as a recognition of land already owned by the Indians. This would be particularly true where the Indian at the time actually occupied the soil. In any event even *Jones v. Meehan, supra,* recognized that the land reserved to Chief Moose Dung on his death passed to his eldest son "by the laws, customs, and usages of the tribe . . ." What the *Per Curiam* opinion, and many other opinions in this field fail to recognize is that the individual Indians acquired title by virtue of the *treaty* and that it is not completely correct to say that the United States granted the title. The treaties were the act of two governments. The Indians as possessors had far the greater claim to the extent that they actually occupied the soil and the grantors in the treaty were not solely the United States but included both signatories. And insofar as the right to the soil was concerned more came from the Indians than from the United States. It would hardly be correct to consider that soil actually occupied by an Indian for centuries was property belonging to the United States. The

United States generally recognized the rights of such possessors, and though Indian *claims* to broad territory were only recognized as a right of occupancy, the reservation of individual tracts was on a different footing and generally by one device or another were found to be vested in fee simple in the actual Indian occupant. *Jones v. Meehan, supra,* 175 U.S. at 32, 20 S.Ct. 1, is a good example.

By way of conclusion on all these Indian treaties, in short, I deny that recognizing the ancestral right of Chief Moose Dung to pitch his tepee by the waters of Thief River is sufficient legal authority to give away the entire Panama Canal without benefit of Congress. Claiming support from such decision indicates the weakness of appellee's case because the character of the two treaties, the relationship of the signatories, the consideration involved, the nature of our interest or claim to the property involved and our relationships to them are all different in material respects.

Therefore, the treaties with the Cherokees, the Chippewa Indians, and the transfer to Chief Moose Dung do *not* constitute authority that the Panama Canal Zone property of the United States may be transferred to Panama without the approval of *the Congress.* The same general *modus operandi* was followed in other Indian treaties.

This also disposes of the decision in *Francis v. Francis,* 203 U.S. 233, 27 S.Ct. 129, 51 L.Ed. 165 (1906), cited in the *Per Curiam* opinion. That is another Indian treaty case which interpreted one of the usual "reservations" that the Indians customarily made when they transferred some of their lands to the United States by treaty. As in the other Indian treaty cases, the first Justice Harlan's opinion did not overturn the Chancellor's ruling that the named Indian "and his heirs" obtained a fee simple estate in Indian lands which were "reserved [and] did *not* pass to the United States by the Treaty" (emphasis added) because under a rule of property in Michigan where the lands were located "[t]he term *reservation* was equivalent to an absolute grant." The result in that respect was not disturbed. Thus, again the peculiarities of a reservation by Indians of their own lands in a joint treaty with the United States, belies the fact that the title passed by the treaty was to property (soil) that actually belonged to the United States. A more accurate description of the actual situation would be that the Indians never relinquished their claim and the treaty confirmed their title. These Indian treaties thus, to a certain extent, fall within treaties dealing with disputed claims. The citation of *Francis* by the *Per Curiam* opinion at page —— of 188 U.S.App.D.C., at page 1062 of 580 F.2d overlooks the fact that it was the treaty of *both* parties that vested complete title, not the sole act of the United States. The case does not hold that the United States could transfer the soil by deed.

It also goes without saying that even if the Indians and the United States could jointly convey property to an Indian by a reservation of soil that he claimed, such precedents are not authority for the United States transferring property to Panama that is owned outright by the United States. The Panama Canal Treaty is an unquestioned disposition of property of the United States. The Indian treaties disposed of disputed territory and recognized claims of individual Indians to particular soil. This case is of interest though for another reason: it holds that the President, "*without the authority of an act of Congress,*" was not authorized to agree in the Treaty to a proviso that none of the reserved Indian lands could be conveyed without his consent. To a certain extent this recognizes that in Indian treaties the title is not conveyed to reservees but more accurately is merely recognized. *See* 50 U.S. (9 How.) at 365.

B. *Treaties With Foreign Nations*

1. *Treaty of February 22, 1819 between the United States and Spain (8 Stat. 252).*—Spain ceded all of east and west Florida to the United States. The parties also agreed upon a boundary west of the Mississippi River beginning at the mouth of

the Sabine River in the Gulf of Mexico, thence generally north and west to the Red River and the Arkansas River, and thence to the source of that river, and thence due west along the 42nd line of latitude to the South Sea (Pacific Ocean). On both sides of that boundary line, the respective parties ceded to each other their *claims* and pretentions to the territory in question. The treaty indicated that the parties did not know the precise source of the Arkansas River and, particularly in the mountain areas, neither nation was sufficiently familiar with much of the areas traversed by the newly drawn boundary lines to know precisely what was accomplished. This indicated the "claim" nature of the asserted rights.

Taken by its four corners, this treaty is hardly a disposition of United States property. It is a mutual relinquishment of boundary claims which is a usual subject of diplomacy, particularly in undeveloped areas. The settlement of many boundary disputes are more the settlement of claims rather than transfers of property.[39]

2. *Treaty of August 9, 1842 between the United States and Great Britain (Webster-Ashburton Treaty) 8 Stat. 572.*—This settled the boundary between the United States and Canada from the east through the Great Lakes, the present boundary waters and thence to the Rocky Mountains along the 49th parallel. Like the prior treaty, the parties here did not know where the boundary line they drew would begin to run westward from the Lake of the Woods. One result of this arrangement was the odd "Northwest angle" in Minnesota, which is completely separated by water from all United States territory. The treaty recognized prior grants of land by both countries in disputed areas. This agreement is within the traditional treaty-making function and does not qualify as a disposition of territory. It would be hard to point to the transfer of any *property* that belonged to the United States. This treaty is a perfect example of the settlement, in many respects, of highly questionable claims and not of the transfer of territory or property.

3. *The Treaty of June 15, 1846 between the United States and Great Britain. The Oregon-Washington boundaries (9 Stat. 869).*—The treaty recited that there was "doubt and uncertainty . . . respecting the sovereignty and government of . . . the northwest coast of America . . . westward of the Rocky or Stony Mountains." The treaty continued the boundary line westward from the Rocky Mountains along the 49th parallel, and recognized the navigational rights on the Columbia River of the Hudson Bay Company and of British subjects on an equal footing with American citizens. This is another example of the settlement of doubtful and uncertain claims of the respective parties and not a transfer of property.

4. *Treaty of February 1, 1933 between the United States and Mexico (84 Cong.Rec. 9824).*—This treaty rectified the boundary along the Rio Grande River in the vicinity of El Paso and the Juarez Valley. The treaty involved a typical, minor boundary matter. Nevertheless, this Treaty looked to Congress for approval: Art. VIII provided that "[e]*ach Government shall respectively secure title* . . . ." Art. VII also provided that "Lands within the rectified channel . . . [that] pass from . . . one country to . . . the other . . *shall be acquired in full ownership by the* [*respective*] *Government* . . ." The treaty was thus executory and, moreover, since it required the appropriation of money, it looked to supporting enactments by the Congress of the United States and did not purport to be self-executing.

5. *Treaty of August 29, 1963 between the United States and Mexico: Solution of El Chamizal, 15 U.S.T. 21.*—This relocated the shifting channel of the Rio Grande River in the vicinity of El Paso and Juarez, and drew a boundary line at the center of a new channel for the river. By this arrangement, 823.50 acres of former United States land was ceded to Mexico by the treaty. However, far from this being an instance where the President attempted to transfer

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[39] *See* notes 23 and 24, *supra*, and accompanying text.

United States territory or property by a self-executing treaty without prior congressional act, *the treaty in Art. 6 specifically recognized the constitutional requirement and provided that the acquisition of the lands be transferred to Mexico and the rights of way for that portion of the new river channel in the territory of the United States shall not occur until "after . . . the necessary legislation has been enacted for carrying it out . . ."* This treaty thus supports appellant's contentions and not those of the appellee. That appropriations were also required may have been an additional reason for recognizing the constitutional role of Congress but that apparent necessity here has not caused the President to recognize the role of Congress. *Cf. Per Curiam* opinion, at —— n. 22, of 188 U.S. App.D.C., at 1063–1064 n. 22 of 580 F.2d. In its discussion of this Mexican treaty the *Per Curiam* opinion recognizes the necessity in that instance for approval by *Congress* because the treaty required implementing legislation (*Per Curiam* op., n. 22). The implementing legislation required by the Panama Canal Treaty will make that necessitated by the Mexican Treaty pale into insignificance.

6. *Treaty of November 23, 1970 between the United States and Mexico (23 U.S.T. 371).*—This is another instance where the treaty resolved boundary differences arising from the shifting of channels. This treaty likewise was contingent and not self-executing, Article ID provided, *i. e.*, that "the necessary legislation has been enacted for carrying it out." 23 U.S.T. 377. This is another treaty that supports appellants' contention and not those of the appellee.

7. *Treaty of November 22, 1971 between the United States and Honduras: Swan Islands (23 U.S.T. 2631).*—Both governments claimed sovereignty of the Swan Islands, but the United States had for many years maintained a navigation and communications facility there. By the treaty, the United States recognized the sovereignty of Honduras and transferred certain land, buildings, and equipment to Honduras. There was a second cooperative agreement whereby the United States was to operate the navigational facilities and Honduras was to assume responsibility for a dock and landing strip. The United States retained title to a great number of buildings and equipment except the land, and by the treaty Honduras made the areas—sites—available to the United States. This was a cooperative program for continuation of meteorological and communication facilities in Swan Islands. To the extent that any property was transferred, it was certainly minimal and hardly justified legislation. It cannot be considered as authority for transferring eight billion dollars of United States property.

8. *Treaty of June 17, 1971 between the United States and Japan (23 U.S.T. 447).*—This related to the reversion of the Ryukyu (includes Okinawa) and Daito Islands. Some of this property may have been transferred pursuant to prior congressional enactments, *i. e.*, 40 U.S.C. §§ 511 and 512. Section 511 authorizes federal agencies having foreign excess property to dispose of such property. That is definitely authorization for the transfer of what would be excess property of the United States after the reduction of our military operations on Okinawa. The treaty relinquished in favor of Japan all rights and interests under Art. III of the Treaty of Peace with Japan of September 8, 1951. Japan in turn granted to the United States the use of facilities and areas in accordance with the treaty of January 19, 1960, which was the Treaty of Mutual Cooperation and Security providing for collective self-defense. Art. IX of this treaty terminated our *temporary right of military occupation.* It is hard to construe this treaty as authority for transferring United States property by treaty without implementing legislation.

9. *Treaty of January 25, 1955 between the United States and Panama (6 U.S.T. 2283).*—This treaty, as discussed earlier, provided for the transfers of certain property. Art. V provided for the conveyance to Panama of certain lands and improvements set forth in item 2 of the Memorandum of Understanding. This included certain specified lands, including the railway terminal operations in the city of Panama, and the

railway passenger station, and Paitilla Point. The treaty, however, was not self-executing as Art. V recognized the need to comply with Art. IV, § 3, cl. 2 of the Constitution, as that Article provided that the transfer of property was "*subject to the enactment of legislation by the Congress,*" and with respect to the small amount of property in Art. VI and Art. VII, Congress *did* enact legislation with respect thereto.[40]

It must be recognized that no court has had any opportunity to pass on the validity of many of these provisions, because when property or rights are transferred in a foreign country pursuant to asserted or *de facto* authority, as the practical matter, it is difficult, if not impossible thereafter, to litigate or rescind the transfer.

C. *Treaty Summary*

In sum, no substantial support can be found in any of the 11 treaties for appellee's contention. The Indian treaties do not support his position because of their very nature, *i. e.*, the land allegedly transferred to the Indian is his land which he reserves from transfer to the United States under the treaty. The treaties with Spain and Great Britain involved the settlement of boundary claims and this is not a boundary controversy. Indeed, it would be hard to convince Spain and the British that in these treaties, which expanded our frontiers to absorb all of Florida on the south and to stretch our boundary westward from the Louisiana Purchase to the Pacific Ocean between the 42nd and 49th parallels, the United States was disposing of its own property. Two of the three treaties with Mexico specifically recognized the need for congressional legislation and the third treaty implicitly recognized such necessity; the Honduras treaty involved very minimal amounts of property; the Japan treaty had statutory authority to transfer surplus war property and otherwise merely relinquish our temporary right of military occupation; and the 1955 Panamanian treaty specifically recognized that legislation by Congress was necessary to the transfer of United States property.

When these eleven treaties are examined and analyzed, and those are culled out wherein the constitutional requirements were complied with through the enactment by Congress of implementing legislation and thus strongly support the position of the appellant-Congressmen, it appears obvious that there is dearth, if not an almost complete absence, of any supporting authority for the action of the appellee in attempting to bypass the entire House of Representatives in this transfer to Panama of the tremendous amount of property of the United States that is here involved.

CONCLUSION

From the foregoing it is concluded that a political question is not involved, that established procedures of the Department of State and past United States procedures involving similar agreements with Panama and others recognize and require that Congress approve the transfer of United States property, that the Restatement of Foreign Relations Law reaches the same conclusion, and that the adjudicated cases hold that the power to dispose of United States property is vested exclusively in the Congress. In my opinion, we should accordingly declare the law to be that those provisions of the pending treaty which dispose of territory or property belonging to the United States to the Republic of Panama cannot come into force under the Constitution of the United States until approved by the Congress. In my view, because of the parties involved, it would not be necessary to issue an injunction.

The Report of the Senate Committee on Foreign Relations of a much earlier date has much advice that could well be followed by the relevant parties in the present controversy:

> The question has been debated how far Congress would be bound to give effect, in cases requiring its cooperation, to regulations by treaty on subjects put within its express province by the Constitution.

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[40] *See* note 18 *supra*.

> Whichever may be the better opinion, the doubt supplies reason enough against putting the question to trial in other circumstances than those in which the concurrence of Congress may be safely assumed. And the reason is the stronger for this forbearance from the fact that in the contingency of conflict it would be not the interests only, but the faith, too, of the nation which might be compromised, as this would have been committed by the adoption of the treaty regulations.
>
> The condition of the Government at this point is of peculiar delicacy as regards the arrangement of its imposts. Parties have been arrayed with vehemence and the greatest sensibility awakened on the subject. Regulation by treaty in these circumstances would doubtless be carried into effect by the House of Representatives. But the temper in which the supposed intrusion might be expected to be received would be anything but cordial or placid. Ought not the occasion to be considerable, the motive urgent, to warrant the exercise of the authority at this cost? This is a topic requiring only to be displayed, not dwelt on.

2 Hinds' Precedents § 1532, at 1000.

What is the great urgency for not recognizing the constitutional right and duty of the House of Representatives to pass on the transfer of the rare property here involved? The United States by the narrow margin of one vote was enticed into accepting Panama as the first choice over Nicaragua for the location of the Canal, and the operating rights promised by Panama in the 1903 treaty were purposely designed to assure that the United States would build the Canal in Panama and not in Nicaragua.[41] Thereafter, a national treasure beyond compare in the form of an engineering marvel was created by the ingenuity and genius of American statesmen, builders, and doctors who persevered where all others had failed miserably, or failed even to begin. And with an expenditure by Congress of this nation's wealth never before equalled in history created an international public facility that has given Panama a healthful community it never before possessed, a much higher standard of living than its neighbors, and under benign United States' management benefited the entire world.

The transfer of United States territory and property in the Panama Canal Zone directly affects immense vital interests of the entire nation involving as it does significant commercial concerns and our national security. Some of these matters were pointed out by Senator Hiram Johnson of California in 1939, when, in speaking on the ratification of the Hull-Alfaro Treaty, which proposed certain amendments in our relations with Panama, he remarked:

> The Panama Canal will be protected, if protected, by us. The Panama Canal, if it be retained, and if it serve its purpose [as "the life line of the Republic," *id.*, 9838], will do so because of our efforts; and the Panama Canal, because of the peculiar relation we have to it, should not be in any degree tied, or hamstrung, or put in a strait jacket by a treaty made by the United States of America.

84 Cong.Rec. 9838 (1939). The momentous nature of these national interests peculiarly qualify the House of Representatives for its constitutional role because it directly represents our entire citizenry on a uniform basis—which was the principal reason that the Framers of the Constitution directed that the entire Congress should pass on such matters.

However, regardless of disputes on other issues, one conclusion is certain. That is that if the present attempt successfully usurps the constitutional right and duty of the House of Representatives to vote on the disposition of United States' property of the tremendous magnitude and value of our Panama holdings a precedent of such enormity will be created that the constitutional right of the House of Representatives to vote on transfers of property to foreign nations need never again be seriously recognized.

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[41] Bunau-Varilla, Envoy Extraordinary for the Republic of Panama, in a negotiation of the treaty for the Canal decided that the prior treaty draft would not do:

> The "indispensable condition of success" was to write a new treaty "so well adapted to American exigencies" that it would be certain to pass in the Senate by the required two-thirds majority. A failure to obtain that two-thirds majority, he was convinced, could still mean a Nicaragua canal after all. The major difference in the new treaty must be in the share of sovereignty attributed to the United States within the canal zone. [Perpetuity was already provided for.]

D. McCullough, The Path Between the Seas 391 (1977).

To the extent that the President may have discretion to choose between proceeding by treaty or other forms of international agreement, he cannot avoid the constitutional requirement that the entire Congress pass on all attempts to dispose of United States' territory and property to other nations. All past practices in this field indicate that prior Presidents have recognized that obligation even when property of much less value and significance was involved.[42]

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[42] The Standing of the Members of the House of Representatives to Request a Declaration of the law

The district court concluded that it lacked subject matter jurisdiction over plaintiffs' complaint because, in its view, plaintiffs had not met the " 'irreducible constitutional minimum' of a concrete injury in fact to their legislative roles." Memo. Op. at 12–13. I disagree with this conclusion.

Recently, we have considered cases involving standing of Congressmen to bring actions in the federal courts. Judge Wilkey's opinion in *Harrington v. Bush*, 180 U.S.App.D.C. 45, 553 F.2d 190 (1977), provides a thorough discussion of the applicable analytical framework:

> The *most basic point* to consider is that *there are no special standards for determining Congressional standing questions.* Although the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same.
>
> There is no single test or formula to be derived from the case law to determine if a particular complaining party has standing to sue. Rather, the case law provides a *series of inquiries designed primarily*[68] *to determine if the complaining party has suffered some injury in fact.*

180 U.S.App.D.C. at 59, 60–61, 553 F.2d at 204, 205–06 (emphasis original). The injury in fact requirement is constitutionally mandated; it is one of the requirements designed to implement the Art. III "case or controversy" limitation on federal judicial power. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Harrington v. Bush, supra*, 180 U.S.App.D.C. at 61, 553 F.2d at 206. Footnote 68 in the *Harrington* opinion outlined the four separate inquiries demanded by the Supreme Court cases on standing: (1) first, and most important, that there be an injury in fact; (2) that the interests being asserted by the plaintiffs are within the zone of interests to be protected by the statute or constitutional guarantee in question; (3) that the injury result from (or be caused by) the challenged "illegal" action; and (4) that the injury be capable of being redressed by a favorable decision. 180 U.S.App.D.C. at 60–61 n.68, 553 F.2d at 205–06 n.68. The district court found no injury in fact, and therefore had no reason to consider the other three inquiries. As to the critical question of whether an injury in fact exists, it is my conclusion that it does.

The prior cases in this circuit provide examples of how the analytical scheme articulated in *Harrington* applies to particular situations. *Kennedy v. Sampson*, 167 U.S.App.D.C. 192, 511 F.2d 430 (1974), involved Senator Kennedy's suit against the Administrator of the General Services Administration and the Chief of the White House Records seeking a declaration that the Family Practice of Medicine Act become law on December 25, 1970, and an order requiring appellants to publish the Act as a validly enacted law. The question on the merits was the effect of President Nixon's pocket veto; a preliminary question was the standing of Sen. Kennedy to bring the suit. The court found that Kennedy had standing, as a "logical nexus" existed between the status he asserted and the claim sought to be adjudicated:

> If appellants' arguments are accepted, then appellee's vote in favor of the bill in question has been nullified and appellee has no right to demand or participate in a vote to override the President's veto. Conversely, if appellee's interpretation of the veto clause is correct, then the bill became law without the President's signature. In short, disposition of the substantive issue will determine the effectiveness *vel non* of appellee's actions as a legislator with respect to the legislation in question.

167 U.S.App.D.C. at 195, 511 F.2d at 433. Thus, in *Kennedy*, the facts presented a situation where the Executive's action had in effect nullified the Senator's vote; the validity of the action was determinative on the effect of the vote. And particularly he had been prevented from exercising his constitutional right to vote on the motion to overrule. In such circumstance, this court concluded that Senator Kennedy had standing to challenge the vote.

In *Mitchell v. Laird*, 159 U.S.App.D.C. 344, 488 F.2d 611 (1973), in dictum, we recognized

Note 42—Continued

the standing of thirteen members of the House of Representatives to litigate presidential war powers, when we stated that a declaratory judgment

> would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint.

159 U.S.App.D.C. at 347, 488 F.2d at 614.

We concluded that plaintiffs lacked standing to bring their claims in both *Harrington, supra,* and in *Metcalf v. National Petroleum Council,* 180 U.S.App.D.C. 31, 553 F.2d 176 (1977). Neither plaintiff had demonstrated a cognizable injury to his person or to his ability to function as a legislator. Nothing impeded the legislative process whatsoever. Representative Harrington sought a declaration that certain foreign and domestic activities of the Central Intelligence Agency were illegal and also an injunction prohibiting the CIA from using the funding and reporting provisions of the Central Intelligence Agency Act of 1949 in connection with allegedly illegal activities. After an extensive analysis of the supposed injuries claimed by the plaintiff, we concluded:

> Since the appellant in this case has suffered no injury in a constitutional sense, he is in effect seeking to use the court to vindicate his own political values and preferences. By so doing, appellant is asking us in large part to usurp the legislative function and to grant him the relief *which his colleagues have refused him.*

180 U.S.App.D.C. at 70, 553 F.2d at 215 (emphasis added). Since appellant failed to show an injury in fact in the constitutional sense, we affirmed the district court's dismissal of his complaint.

A similar situation was posed in the *Metcalf* case, where Senator Metcalf sought declaratory and injunctive relief, alleging that the National Petroleum Council was unlawfully functioning as an advisory committee in violation of the Federal Advisory Committee Act and the Federal Energy Administration Act. He contended that the Council was not fairly balanced in membership and was improperly influenced by certain petroleum industry interest groups. We noted that his complaint was a generalized grievance that did not allege any specific, objective, present harm or threat of harm; the nature and effect of the unspecified harm was indeterminate. 180 U.S.App.D.C. at 42–43, 553 F.2d at 187–88. Nothing impeded the functioning of Sen. Metcalf in his role as a legislator, and we affirmed the district court's dismissal of the complaint.

We next considered a claimed controversy involving seventeen Congressmen who challenged General Services Administration regulations authorizing agencies to grant rights to patents and inventions developed from federal funds. Our decision in *Public Citizen v. Sampson,* 169 U.S.App.D.C. 301, 515 F.2d 1018 (1975), affirmed without opinion the decision of the district court, reported at 379 F.Supp. 662, granting the defendant's motion to dismiss the complaint. In evaluating plaintiffs' standing as Congressmen, the district court stated:

> It is beyond peradventure that plaintiff Congressmen could tomorrow propose legislation regulating the contractual authority of the General Services Administration.

379 F.Supp. at 667. The powers of the plaintiff Congressmen in that case as Representatives were not diminished in any respect.

As noted above, an injury in fact is required for standing in all cases; with respect to Congressmen as plaintiffs, the case law in this circuit, not surprisingly, demonstrates that this court will demand a showing of an injury in fact. We could not otherwise justify our jurisdiction. In all cases, this requirement helps guarantee that the "controversy" has sufficient adverseness and that the parties have sufficient interests to make out a justiciable dispute that satisfies the Art. III case or controversy requirement. Yet in the Congressmen cases, another dimension underlies our insistence on an injury in fact. Our prior cases express concern that Congressmen might seek redress in the courts simply because they failed to persuade their colleagues in making a particular legislative judgment, or they fear that they cannot succeed in a future vote on a particular matter of legislative concern. To grant such Congressmen standing to litigate their claims in the judicial system would have the effect of circumventing the legislative process. In cases in which this court has found the existence of standing, which means that an injury in fact was found to exist, there is no apparent risk that the legislative process will be circumvented or evaded by deciding the case on the merits. It is my opinion that the Congressmen in this case have suffered and are presently suffering an injury in fact, and that the concern which underlies our prior cases—namely, that we have no jurisdiction where a Member of Congress is seeking to evade the legislative process—is simply not a factor in this case.

On September 16, 1977, President Carter transmitted to the Senate for advice and consent to ratification two treaties—the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, and the Panama Canal Treaty. In our opinion we only consider the transfers of property provided for by the Canal Treaty and not any of the rules and regulations concerning the operations of the Canal that are in the Neutrality Treaty. The transmittal to the Senate was made without the inclusion of the usual provisions that is inserted in treaties and international agreements when any participation by the House of Representatives is called for. By this act, President

Note 42—Continued

Carter conformed to an earlier opinion of August 11, 1977 by the Attorney General stating that the approval of the treaties by the House of Representatives even "absent statutory authorization" was not necessary even though the Canal Treaty disposed of United States property. The procedures implemented for obtaining the Senate's advice and consent, which continue today, did not and do not contemplate approval by the House of Representatives to any portion of the treaties. It is my view that the injury in fact to the members of the House of Representatives occurred when President Carter transmitted the treaty in the form described above, *i. e.*, without the customary provisions for enactment of necessary legislation by Congress where United States property was to be transferred. At this point, because of the form of the treaty, it was clear that the House of Representatives could not participate, and insofar as Art. IV required its participation, that this constitutional requirement was being violated. This is a sufficient injury to accord standing. This injury in fact was further substantiated when the Report of the Committee on Foreign Relations of the Senate acceded to the opinion of the Attorney General of August 11, 1977. Senate Executive Report N, No. 95–12, 95th Cong., 1st Sess. 65–69, February 3, 1978.

The central point posed by the Congressmen's claim is that Art. IV, § 3, cl. 2 requires that the House *participate* in the disposition of property: an Act of Congress, it is alleged, is required by the Constitution. The submission of the treaty to the Senate in its present form (*See* Appendix) clearly obviates any participation of the House and since the Senate is presently concurring in that decision, whatever action the House may take is effectively blocked by the President and the Senate. It appears *extremely unlikely*—a near certainty—that the Senate will amend the treaty as submitted to permit House participation in the disposition of property. The Report of the Senate Committee on Foreign Relations states:

> The Committee finds that the . . . Panama Canal Treaty can validly transfer to Panama property belonging to the United States without a need for implementing legislation.

Committee Report at 69. It is extremely unlikely that the Committee will change its position on this issue and recommend that implementing legislation be sought. It is extremely unlikely that the Senate as a whole will reject the recommendation of its Committee on this point. The injury that occurred when the advise and consent procedures were initiated continues so long as the treaty remains in its present form and House concurrence is not sought. Thus, the entire membership of the House of Representatives is suffering *present* injury to its constitutional rights.

On August 11, 1977, Attorney General Bell issued his opinion on the procedures necessary for disposition of property, with special reference to the ratification procedures for the Panama Canal Treaty. This opinion was cited and relied upon by the Senate Foreign Relations Committee. Committee Report, at 69. Therein, Attorney General Bell opined that a treaty may dispose of territory or property belonging to the United States absent statutory authorization. While an Attorney General's opinion is not binding on a court, *see Harris County Commrs. v. Moore*, 420 U.S. 77, 87 n.10, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975); *McElroy v. Guagliardo*, 361 U.S. 281, 285, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960); *Romero v. Coldwell*, 455 F.2d 1163, 1165 (5th Cir. 1972), there is considerable authority that it is binding on an executive official who requests the opinion on a matter of law. Here, the Secretary of State requested the opinion, and the Bell opinion is definitive on the ratification procedure to be employed.

A long line of Attorney General opinions state that the teaching in the opinion is binding as a matter of law on those who request it. 5 Op.Atty.Gen. 97, 97 (1849); 6 Op.Atty.Gen. 326, 334 (1854); 20 Op.Atty.Gen. 654, 659 (1893); 25 Op.Atty.Gen. 301, 303–04 (1904). In *Smith v. Jackson*, 246 U.S. 388, 38 S.Ct. 353, 62 L.Ed. 788 (1918), the Court stated:

> [W]e are of opinion that it is obvious on the face of the statement of the case that the auditor had no power to refuse to carry out the law, and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General, and second, beyond all possible question, to the judgments of the courts below.

246 U.S. at 390–91, 38 S.Ct. at 354. *United States Bedding Co. v. United States*, 55 Ct.Cl. 459, 460–61 (1920) is to the same effect. The general rule does not apply when the matter is within the proper discretion of a department official; hence, the statement has been made that opinions are only entitled to weight and are not controlling. In those circumstances, the point is simply that an opinion is not controlling in a proper area of discretion. *See Senske v. Fairmont & Waseca Canning Co.*, 232 Minn. 350, 359–60, 45 N.W.2d 640, 646–47 (1951); 17 Op.Atty.Gen. 332, 333 (1882).

Hence, it is clear that the opinion of Attorney General Bell with respect to the procedure by which the treaties would be ratified was, in effect binding on the Secretary who requested it. This buttresses our conclusion that the procedure, which did not and does not involve the House, was solidified at the beginning of the transmittal process, and the injury in fact was suffered at that time.

This injury has some similarities to that suffered in *Kennedy*; the right to vote is effectively denied by the challenged action. It is claimed by appellee that the House is free to vote on any version of the treaty; but the procedure is already decided, and the ratification process is underway. As far as the Presi-

APPENDIX

TEXTS OF TREATIES RELATING TO THE PANAMA CANAL

PANAMA CANAL TREATY

The United States of America and the Republic of Panama,

Acting in the spirit of the Joint Declaration of April 3, 1964, by the Representatives of the Governments of the United States of America and the Republic of Panama, and of the Joint Statement of Principles of February 7, 1974, initialed by the Secretary of State of the United States of America and the Foreign Minister of the Republic of Panama, and

Acknowledging the Republic of Panama's sovereignty over its territory,

Have decided to terminate the prior Treaties pertaining to the Panama Canal and to conclude a new Treaty to serve as the basis for a new relationship between them and, accordingly, have agreed upon the following:

ARTICLE I

ABROGATION OF PRIOR TREATIES AND ESTABLISHMENT OF A NEW RELATIONSHIP

1. Upon its entry into force, this Treaty terminates and supersedes:

(a) The Isthmian Canal Convention between the United States of America and the Republic of Panama, signed at Washington, November 18, 1903;

(b) The Treaty of Friendship and Cooperation signed at Washington, March 2, 1936, and the Treaty of Mutual Understanding and Cooperation and the related Memorandum of Understandings Reached, signed at Panama, January 25, 1955, between the United States of America and the Republic of Panama;

(c) All other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama concerning the Panama Canal

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Note 42—Continued

dent and Senate are concerned, any action taken by the House is irrelevant and inconsequential. The House is, in fact, being denied its right to participate, and the existence of this circumstance is enough to confer standing on this court to declare the law. This is quite distinct from the situation in *Metcalf* and *Harrington* where the plaintiffs were free to enact subsequent legislation which *could affect the merits of the issues.* Here, there is nothing the House can do which will alter the fact that they are being denied any present role in the process, as may be required by the Constitution. Moreover, there is no suggestion here that a judicial ruling on the merits will circumvent the legislative process in any way. Rather, the judicial ruling sought here would *protect and implement* the constitutional legislative process.

Under these circumstances, applying the relevant precedents in this circuit and the general principles outlined by the Supreme Court, it must be said that the plaintiffs have suffered an injury in fact sufficient to confer standing. A self-executing treaty means that if it is ratified, and the exchange of documents with Panama causes it to come into force, any objection by the House of Representatives or any other person as to its validity will receive the reply that Buanu-Varilla gave to Federico Boyd in 1903 that protestations would be pointless "as everything is finished." D. McCullough, *supra* note 41, at 395.

There can be no serious dispute about plaintiffs satisfying the other three inquiries relating to standing. Clearly, the denial of the Congressmen's participatory role in the disposition of property is "within the zone of interests to be protected or regulated by the . . . Constitutional guarantee in question." *Ass'n of Data Processing Serv. Organization, Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Also, the injury must be such "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Here, it is the President's submission of the treaties to the Senate without provisions calling for *Congress* to act in the disposition of United States property which has *caused* the denial of the plaintiffs' participatory role under the Constitution in the disposition of property. Finally, the injury must be one "likely to be redressed by a favorable decision." *Id.,* 426 U.S. at 38, 96 S.Ct. at 1924. A judicial decision interpreting the Constitution and declaring the law on the controversy can afford the plaintiffs the precise relief that they request—their participation in the disposition of property to the extent that same is provided for by the Constitution.

It is my view that plaintiffs have standing to bring this action.

APPENDIX—Continued

which were in force prior to the entry into force of this Treaty; and

(d) Provisions concerning the Panama Canal which appear in other treaties, conventions, agreements and exchanges of notes between the United States of America and the Republic of Panama which were in force prior to the entry into force of this Treaty.

2. In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal. The Republic of Panama guarantees to the United States of America the peaceful use of the land and water areas which it has been granted the rights to use for such purposes pursuant to this Treaty and related agreements.

3. The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty.

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

ARTICLE II

RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.

2. This Treaty shall terminate at noon, Panama time, December 31, 1999.

ARTICLE III

CANAL OPERATION AND MANAGEMENT

1. The Republic of Panama, as territorial sovereign, grants to the United States of America the rights to manage, operate, and maintain the Panama Canal, its complementary works, installations and equipment and to provide for the orderly transit of vessels through the Panama Canal. The United States of America accepts the grant of such rights and undertakes to exercise them in accordance with this Treaty and related agreements.

2. In carrying out the foregoing responsibilities, the United States of America may:

(a) Use for the aforementioned purposes, without cost except as provided in this Treaty, the various installations and areas (including the Panama Canal) and waters, described in the Agreement in Implementation of this Article, signed this date, as well as such other areas and installations as are made available to the United States of America under this Treaty and related agreements, and take the measures necessary to ensure sanitation of such areas;

(b) Make such improvements and alterations to the aforesaid installations and areas as it deems appropriate, consistent with the terms of this Treaty;

(c) Make and enforce all rules pertaining to the passage of vessels through the Canal and other rules with respect to navigation and maritime matters, in accordance with this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules;

(d) Establish, modify, collect and retain tolls for the use of the Panama Canal, and other charges, and establish and modify methods of their assessment;

(e) Regulate relations with employees of the United States Government;

APPENDIX—Continued

(f) Provide supporting services to facilitate the performance of its responsibilities under this Article;

(g) Issue and enforce regulations for the effective exercise of the rights and responsibilities of the United States of America under this Treaty and related agreements. The Republic of Panama will lend its cooperation, when necessary, in the enforcement of such rules; and

(h) Exercise any other right granted under this Treaty, or otherwise agreed upon between the two Parties.

3. Pursuant to the foregoing grant of rights, the United States of America shall, in accordance with the terms of this Treaty and the provisions of United States law, carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission, which shall be constituted by and in conformity with the laws of the United States of America.

(a) The Panama Canal Commission shall be supervised by a Board composed of nine members, five of whom shall be nationals of the United States of America, and four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States of America in a timely manner.

(b) Should the Republic of Panama request the United States of America to remove a Panamanian national from membership on the Board, the United States of America shall agree to such request. In that event, the Republic of Panama shall propose another Panamanian national for appointment by the United States of America to such position in a timely manner. In case of removal of a Panamanian member of the Board at the initiative of the United States of America, both Parties will consult in advance in order to reach agreement concerning such removal, and the Republic of Panama shall propose another Panamanian national for appointment by the United States of America in his stead.

(c) The United States of America shall employ a national of the United States of America as Administrator of the Panama Canal Commission, and a Panamanian national as Deputy Administrator, through December 31, 1989. Beginning January 1, 1990, a Panamanian national shall be employed as the Administrator and a national of the United States of America shall occupy the position of Deputy Administrator. Such Panamanian nationals shall be proposed to the United States of America by the Republic of Panama for appointment to such positions by the United States of America.

(d) Should the United States of America remove the Panamanian national from his position as Deputy Administrator, or Administrator, the Republic of Panama shall propose another Panamanian national for appointment to such position by the United States of America.

4. An illustrative description of the activities the Panama Canal Commission will perform in carrying out the responsibilities and rights of the United States of America under this Article is set forth at the Annex. Also set forth in the Annex are procedures for the discontinuance or transfer of those activities performed prior to the entry into force of this Treaty by the Panama Canal Company or the Canal Zone Government which are not to be carried out by the Panama Canal Commission.

5. The Panama Canal Commission shall reimburse the Republic of Panama for the costs incurred by the Republic of Panama in providing the following public services in the Canal operating areas and in housing areas set forth in the Agreement in Implementation of Article III of this Treaty and occupied by both United States and Panamanian citizen employees of the Panama Canal Commission: police, fire protection, street maintenance, street lighting, street cleaning, traffic management and garbage collection. The Panama Canal Commission shall pay the Republic of Panama the sum of ten million United States dollars ($10,000,000) per annum for the foregoing services. It is agreed that every three years from the date that this Treaty enters into force, the costs involved in furnishing said services shall be reexamined to determine

whether adjustment of the annual payment should be made because of inflation and other relevant factors affecting the cost of such services.

6. The Republic of Panama shall be responsible for providing, in all areas comprising the former Canal Zone, services of a general jurisdictional nature such as customs and immigration, postal services, courts and licensing, in accordance with this Treaty and related agreements.

7. The United States of America and the Republic of Panama shall establish a Panama Canal Consultative Committee, composed of an equal number of high-level representatives of the United States of America and the Republic of Panama, and which may appoint such subcommittees as it may deem appropriate. This Committee shall advise the United States of America and the Republic of Panama on matters of policy affecting the Canal's operation. In view of both Parties' special interest in the continuity and efficiency of the Canal operation in the future, the Committee shall advise on matters such as general tolls policy, employment and training policies to increase the participation of Panamanian nationals in the operation of the Canal, and international policies on matters concerning the Canal. The Committee's recommendations shall be transmitted to the two Governments, which shall give such recommendations full consideration in the formulation of such policy decisions.

8. In addition to the participation of Panamanian nationals at high management levels of the Panama Canal Commission, as provided for in paragraph 3 of this Article, there shall be growing participation of Panamanian nationals at all other levels and areas of employment in the aforesaid commission, with the objective of preparing, in an orderly and efficient fashion, for the assumption by the Republic of Panama of full responsibility for the management, operation and maintenance of the Canal upon the termination of this Treaty.

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

10. Upon entry into force of this Treaty, the United States Government agencies known as the Panama Canal Company and the Canal Zone Government shall cease to operate within the territory of the Republic of Panama that formerly constituted the Canal Zone.

ARTICLE IV

PROTECTION AND DEFENSE

1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.

3. In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party. These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal, and with planning for actions to be taken in concert for that pur-

APPENDIX—Continued

pose. Such combined protection and defense arrangements shall not inhibit the identity or lines of authority of the armed forces of the United States of America or the Republic of Panama. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian military operations with respect to the protection and defense of the Canal.

4. The Combined Board shall, at five-year intervals throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.

5. To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States of America will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of the armed forces of the United States of America in the territory of the former Canal Zone immediately prior to the entry into force of this Treaty.

ARTICLE V

PRINCIPLE OF NON-INTERVENTION

Employees of the Panama Canal Commission, their dependents and designated contractors of the Panama Canal Commission, who are nationals of the United States of America, shall respect the laws of the Republic of Panama and shall abstain from any activity incompatible with the spirit of this Treaty. Accordingly, they shall abstain from any political activity in the Republic of Panama as well as from any intervention in the internal affairs of the Republic of Panama. The United States of America shall take all measures within its authority to ensure that the provisions of this Article are fulfilled.

ARTICLE VI

PROTECTION OF THE ENVIRONMENT

1. The United States of America and the Republic of Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.

2. A Joint Commission on the Environment shall be established with equal representation from the United States of America and the Republic of Panama, which shall periodically review the implementation of this Treaty and shall recommend as appropriate to the two Governments ways to avoid or, should this not be possible, to mitigate the adverse environmental impacts which might result from their respective actions pursuant to the Treaty.

3. The United States of America and the Republic of Panama shall furnish the Joint Commission on the Environment complete information on any action taken in accordance with this Treaty which, in the judgment of both, might have a significant effect on the environment. Such information shall be made available to the Commission as far in advance of the contemplated action as possible to facilitate the study by the Commission of any potential environmental problems and to allow for consideration of the recommendation of the Commission before the contemplated action is carried out.

ARTICLE VII

FLAGS

1. The entire territory of the Republic of Panama, including the areas the use of

APPENDIX—Continued

which the Republic of Panama makes available to the United States of America pursuant to this Treaty and related agreements, shall be under the flag of the Republic of Panama, and consequently such flag always shall occupy the position of honor.

2. The flag of the United States of America may be displayed, together with the flag of the Republic of Panama, at the headquarters of the Panama Canal Commission, at the site of the Combined Board, and as provided in the Agreement in Implementation of Article IV of this Treaty.

3. The flag of the United States of America also may be displayed at other places and on some occasions, as agreed by both Parties.

ARTICLE VIII

PRIVILEGES AND IMMUNITIES

1. The installations owned or used by the agencies or instrumentalities of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements, and their official archives and documents, shall be inviolable. The two Parties shall agree on procedures to be followed in the conduct of any criminal investigation at such locations by the Republic of Panama.

2. Agencies and instrumentalities of the Government of the United States of America operating in the Republic of Panama pursuant to this Treaty and related agreements shall be immune from the jurisdiction of the Republic of Panama.

3. In addition to such other privileges and immunities as are afforded to employees of the United States Government and their dependents pursuant to this Treaty the United States of America may designate up to twenty officials of the Panama Canal Commission who, along with their dependents, shall enjoy the privileges and immunities accorded to diplomatic agents and their dependents under international law and practice. The United States of America shall furnish to the Republic of Panama a list of the names of said officials and their dependents, identifying the positions they occupy in the Government of the United States of America, and shall keep such list current at all times.

ARTICLE IX

APPLICABLE LAWS AND LAW ENFORCEMENT

1. In accordance with the provisions of this Treaty and related agreements, the law of the Republic of Panama shall apply in the areas made available for the use of the United States of America pursuant to this Treaty. The law of the Republic of Panama shall be applied to matters or events which occurred in the former Canal Zone prior to the entry into force of this Treaty only to the extent specifically provided in prior treaties and agreements.

2. Natural or juridical persons who, on the date of entry into force of this Treaty, are engaged in business or non-profit activities at locations in the former Canal Zone may continue such businesses or activities at those locations under the same terms and conditions prevailing prior to the entry into force of this Treaty for a thirty-month transition period from its entry into force. The Republic of Panama shall maintain the same operating conditions as those applicable to the aforementioned enterprises prior to the entry into force of this Treaty in order that they may receive licenses to do business in the Republic of Panama subject to their compliance with the requirements of its law. Thereafter, such persons shall receive the same treatment under the law of the Republic of Panama as similar enterprises already established in the rest of the territory of the Republic of Panama without discrimination.

3. The rights of ownership, as recognized by the United States of America, enjoyed by natural or juridical private persons in buildings and other improvements to real property located in the former Canal Zone shall be recognized by the Republic of Panama in conformity with its laws.

4. With respect to buildings and other improvements to real property located in

the Canal operating areas, housing areas or other areas subject to the licensing procedure established in Article IV of the Agreement in Implementation of Article III of this Treaty, the owners shall be authorized to continue using the land upon which their property is located in accordance with the procedures established in that Article.

5. With respect to buildings and other improvements to real property located in areas of the former Canal Zone to which the aforesaid licensing procedure is not applicable, or may cease to be applicable during the lifetime or upon termination of this Treaty, the owners may continue to use the land upon which their property is located, subject to the payment of a reasonable charge to the Republic of Panama. Should the Republic of Panama decide to sell such land, the owners of the buildings or other improvements located thereon shall be offered a first option to purchase such land at a reasonable cost. In the case of non-profit enterprises, such as churches and fraternal organizations, the cost of purchase will be nominal in accordance with the prevailing practice in the rest of the territory of the Republic of Panama.

6. If any of the aforementioned persons are required by the Republic of Panama to discontinue their activities or vacate their property for public purposes, they shall be compensated at fair market value by the Republic of Panama.

7. The provisions of paragraphs 2–6 above shall apply to natural or juridical persons who have been engaged in business or non-profit activities at locations in the former Canal Zone for at least six months prior to the date of signature of this Treaty.

8. The Republic of Panama shall not issue, adopt or enforce any law, decree, regulation, or international agreement or take any other action which purports to regulate or would otherwise interfere with the exercise on the part of the United States of America of any right granted under this Treaty or related agreements.

9. Vessels transiting the Canal, and cargo, passengers and crews carried on such vessels shall be exempt from any taxes, fees, or other charges by the Republic of Panama. However, in the event such vessels call at a Panamanian port, they may be assessed charges incident thereto, such as charges for services provided to the vessel. The Republic of Panama may also require the passengers and crew disembarking from such vessels to pay such taxes, fees and charges as are established under Panamanian law for persons entering its territory. Such taxes, fees and charges shall be assessed on a nondiscriminatory basis.

10. The United States of America and the Republic of Panama will cooperate in taking such steps as may from time to time be necessary to guarantee the security of the Panama Canal Commission, its property, its employees and their dependents, and their property, the Forces of the United States of America and the members thereof, the civilian component of the United States Forces, the dependents of members of the Forces and the civilian component, and their property, and the contractors of the Panama Canal Commission and of the United States Forces, their dependents, and their property. The Republic of Panama will seek from its Legislative Branch such legislation as may be needed to carry out the foregoing purposes and to punish any offenders.

11. The Parties shall conclude an agreement whereby nationals of either State, who are sentenced by the courts of the other State, and who are not domiciled therein, may elect to serve their sentences in their State of nationality.

ARTICLE X

EMPLOYMENT WITH THE PANAMA CANAL COMMISSION

1. In exercising its rights and fulfilling its responsibilities as the employer, the United States of America shall establish employment and labor regulations which shall contain the terms, conditions and prerequisites for all categories of employees of the Panama Canal Commission. These regulations shall be provided to the Republic of Panama prior to their entry into force.

APPENDIX—Continued

2. (a) The regulations shall establish a system of preference when hiring employees, for Panamanian applicants possessing the skills and qualifications required for employment by the Panama Canal Commission. The United States of America shall endeavor to ensure that the number of Panamanian nationals employed by the Panama Canal Commission in relation to the total number of its employees will conform to the proportion established for foreign enterprises under the law of the Republic of Panama.

(b) The terms and conditions of employment to be established will in general be no less favorable to persons already employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, than those in effect immediately prior to that date.

3. (a) The United States of America shall establish an employment policy for the Panama Canal Commission that shall generally limit the recruitment of personnel outside the Republic of Panama to persons possessing requisite skills and qualifications which are not available in the Republic of Panama.

(b) The United States of America will establish training programs for Panamanian employees and apprentices in order to increase the number of Panamanian nationals qualified to assume positions with the Panama Canal Commission, as positions become available.

(c) Within five years from the entry into force of this Treaty, the number of United States nationals employed by the Panama Canal Commission who were previously employed by the Panama Canal Company shall be at least twenty percent less than the total number of United States nationals working for the Panama Canal Company immediately prior to the entry into force of this Treaty.

(d) The United States of America shall periodically inform the Republic of Panama, through the Coordinating Committee, established pursuant to the Agreement in Implementation of Article III of this Treaty, of available positions within the Panama Canal Commission. The Republic of Panama shall similarly provide the United States of America any information it may have as to the availability of Panamanian nationals claiming to have skills and qualifications that might be required by the Panama Canal Commission, in order that the United States of America may take this information into account.

4. The United States of America will establish qualification standards for skills, training and experience required by the Panama Canal Commission. In establishing such standards, to the extent they include a requirement for a professional license, the United States of America, without prejudice to its right to require additional professional skills and qualifications, shall recognize the professional licenses issued by the Republic of Panama.

5. The United States of America shall establish a policy for the periodic rotation, at a maximum of every five years, of United States citizen employees and other non-Panamanian employees, hired after the entry into force of this Treaty. It is recognized that certain exceptions to the said policy of rotation may be made for sound administrative reasons, such as in the case of employees holding positions requiring certain non-transferable or non-recruitable skills.

6. With regard to wages and fringe benefits, there shall be no discrimination on the basis of nationality, sex, or race. Payments by the Panama Canal Commission of additional remuneration, or the provision of other benefits, such as home leave benefits, to United States nationals employed prior to entry into force of this Treaty, or to persons of any nationality, including Panamanian nationals who are thereafter recruited outside of the Republic of Panama and who change their place of residence, shall not be considered to be discrimination for the purpose of this paragraph.

7. Persons employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty, who are displaced from their employment

APPENDIX—Continued

as a result of the discontinuance by the United States of America of certain activities pursuant to this Treaty, will be placed by the United States of America, to the maximum extent feasible, in other appropriate jobs with the Government of the United States in accordance with United States Civil Service regulations. For such persons who are not United States nationals, placement efforts will be confined to United States Government activities located within the Republic of Panama. Likewise, persons previously employed in activities for which the Republic of Panama assumes responsibility as a result of this Treaty will be continued in their employment to the maximum extent feasible by the Republic of Panama. The Republic of Panama shall, to the maximum extent feasible, ensure that the terms and conditions of employment applicable to personnel employed in the activities for which it assumes responsibility are no less favorable than those in effect immediately prior to the entry into force of this Treaty. Non-United States nationals employed by the Panama Canal Company or Canal Zone Government prior to the entry into force of this Treaty who are involuntarily separated from their positions because of the discontinuance of an activity by reason of this Treaty, who are not entitled to an immediate annuity under the United States Civil Service Retirement System, and for whom continued employment in the Republic of Panama by the Government of the United States of America is not practicable, will be provided special job placement assistance by the Republic of Panama for employment in positions for which they may be qualified by experience and training.

8. The Parties agree to establish a system whereby the Panama Canal Commission may, if deemed mutually convenient or desirable by the two Parties, assign certain employees of the Panama Canal Commission, for a limited period of time, to assist in the operation of activities transferred to the responsibility of the Republic of Panama as a result of this Treaty or related agreements. The salaries and other costs of employment of any such persons assigned to provide such assistance shall be reimbursed to the United States of America by the Republic of Panama.

9. (a) The right of employees to negotiate collective contracts with the Panama Canal Commission is recognized. Labor relations with employees of the Panama Canal Commission shall be conducted in accordance with forms of collective bargaining established by the United States of America after consultation with employee unions.

(b) Employee unions shall have the right to affiliate with international labor organizations.

10. The United States of America will provide an appropriate early optional retirement program for all persons employed by the Panama Canal Company or Canal Zone Government immediately prior to the entry into force of this Treaty. In this regard, taking into account the unique circumstances created by the provisions of this Treaty, including its duration, and their effect upon such employees, the United States of America shall, with respect to them:

(a) determine that conditions exist which invoke applicable United States law permitting early retirement annuities and apply such law for a substantial period of the duration of the Treaty;

(b) seek special legislation to provide more liberal entitlement to, and calculation of, retirement annuities than is currently provided for by law.

ARTICLE XI

PROVISIONS FOR THE TRANSITION PERIOD

1. The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms. In order to provide for an orderly transition to the full application of the jurisdictional arrangements established by this Treaty and related agreements, the provisions of this Article shall become applicable upon the date this Treaty enters into force, and

shall remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit, the full application and effect of the rights and authority granted to the United States of America elsewhere in this Treaty and in related agreements.

2. During this transition period, the criminal and civil laws of the United States of America shall apply concurrently with those of the Republic of Panama in certain of the areas and installations made available for the use of the United States of America pursuant to this Treaty, in accordance with the following provisions:

(a) The Republic of Panama permits the authorities of the United States of America to have the primary right to exercise criminal jurisdiction over United States citizen employees of the Panama Canal Commission and their dependents, and members of the United States Forces and civilian component and their dependents, in the following cases:

(i) for any offense committed during the transition period within such areas and installations, and

(ii) for any offense committed prior to that period in the former Canal Zone.

The Republic of Panama shall have the primary right to exercise jurisdiction over all other offenses committed by such persons, except as otherwise provided in this Treaty and related agreements or as may be otherwise agreed.

(b) Either Party may waive its primary right to exercise jurisdiction in a specific case or category of cases.

3. The United States of America shall retain the right to exercise jurisdiction in criminal cases relating to offenses committed prior to the entry into force of this Treaty in violation of the laws applicable in the former Canal Zone.

4. For the transition period, the United States of America shall retain police authority and maintain a police force in the aforementioned areas and installations. In such areas, the police authorities of the United States of America may take into custody any person not subject to their primary jurisdiction if such person is believed to have committed or to be committing an offense against applicable laws or regulations, and shall promptly transfer custody to the police authorities of the Republic of Panama. The United States of America and the Republic of Panama shall establish joint police patrols in agreed areas. Any arrests conducted by a joint patrol shall be the responsibility of the patrol member or members representing the Party having primary jurisdiction over the person or persons arrested.

5. The courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the United States of America in accordance with this Article.

6. In civil cases, the civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force of this Treaty shall, to the extent not inconsistent with this Treaty and related agreements, continue in force for the purpose of the exercise by the United States of America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pend-

ing at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

8. During this transition period, the United States of America may continue to incarcerate individuals in the areas and installations made available for the use of the United States of America by the Republic of Panama pursuant to this Treaty and related agreements, or to transfer them to penal facilities in the United States of America to serve their sentences.

ARTICLE XII

A SEA-LEVEL CANAL OR A THIRD LANE OF LOCKS

1. The United States of America and the Republic of Panama recognize that a sea-level canal may be important for international navigation in the future. Consequently, during the duration of this Treaty, both Parties commit themselves to study jointly the feasibility of a sea-level canal in the Republic of Panama, and in the event they determine that such a waterway is necessary, they shall negotiate terms, agreeable to both Parties, for its construction.

2. The United States of America and the Republic of Panama agree on the following:

(a) No new interoceanic canal shall be constructed in the territory of the Republic of Panama during the duration of this Treaty, except in accordance with the provisions of this Treaty, or as the two Parties may otherwise agree; and

(b) During the duration of this Treaty, the United States of America shall not negotiate with third States for the right to construct an interoceanic canal on any other route in the Western Hemisphere, except as the two Parties may otherwise agree.

3. The Republic of Panama grants to the United States of America the right to add a third lane of locks to the existing Panama Canal. This right may be exercised at any time during the duration of this Treaty, provided that the United States of America has delivered to the Republic of Panama copies of the plans for such construction.

4. In the event the United States of America exercises the right granted in paragraph 3 above, it may use for that purpose, in addition to the areas otherwise made available to the United States of America pursuant to this Treaty, such other areas as the two Parties may agree upon. The terms and conditions applicable to Canal operating areas made available by the Republic of Panama for the use of the United States of America pursuant to Article III of this Treaty shall apply in a similar manner to such additional areas.

5. In the construction of the aforesaid works, the United States of America shall not use nuclear excavation techniques without the previous consent of the Republic of Panama.

ARTICLE XIII

PROPERTY TRANSFER AND ECONOMIC PARTICIPATION BY THE REPUBLIC OF PANAMA

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and free of liens and debts, except as the two Parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including nonremovable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include buildings and other facilities,

APPENDIX—Continued

except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion, thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of Panama.

(d) Upon termination of this Treaty, all real property and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal, in accordance with the following:

(a) An annual amount to be paid out of Canal operating revenues computed at a rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or its equivalency, for each vessel transiting the Canal after the entry into force of this Treaty, for which tolls are charged. The rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or its equivalency, will be adjusted to reflect changes in the United States wholesale price index for total manufactured goods during biennial periods. The first adjustment shall take place five years after entry into force of this Treaty, taking into account the changes that occurred in such price index during the preceding two years. Thereafter, successive adjustments shall take place at the end of each biennial period. If the United States of America should decide that another indexing method is preferable, such method shall be proposed to the Republic of Panama and applied if mutually agreed.

(b) A fixed annuity of ten million United States dollars ($10,000,000) to be paid out of Canal operating revenues. This amount shall constitute a fixed expense of the Panama Canal Commission.

(c) An annual amount of up to ten million United States dollars ($10,000,000) per year, to be paid out of Canal operating revenues to the extent that such revenues exceed expenditures of the Panama Canal Commission including amounts paid pursuant to this Treaty. In the event Canal operating revenues in any year do not produce a surplus sufficient to cover this payment, the unpaid balance shall be paid from operating surpluses in future years in a manner to be mutually agreed.

ARTICLE XIV

SETTLEMENT OF DISPUTES

In the event that any question should arise between the Parties concerning the interpretation of this Treaty or related agreements, they shall make every effort to resolve the matter through consultation in the appropriate committees established pursuant to this Treaty and related agreements, or, if appropriate, through diplomatic channels. In the event the Parties are unable to resolve a particular matter through such means, they may, in appropriate cases, agree to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate.

DONE at Washington, this 7th day of September, 1977, in duplicate, in the English and Spanish languages, both texts being equally authentic.

APPENDIX—Continued

ANNEX

PROCEDURES FOR THE CESSATION OR TRANSFER OF ACTIVITIES CARRIED OUT BY THE PANAMA CANAL COMPANY AND THE CANAL ZONE GOVERNMENT AND ILLUSTRATIVE LIST OF THE FUNCTIONS THAT MAY BE PERFORMED BY THE PANAMA CANAL COMMISSION

1. The laws of the Republic of Panama shall regulate the exercise of private economic activities within the areas made available by the Republic of Panama for the use of the United States of America pursuant to this Treaty. Natural or juridical persons who, at least six months prior to the date of signature of this Treaty, were legally established and engaged in the exercise of economic activities in the former Canal Zone, may continue such activities in accordance with the provisions of paragraphs 2–7 of Article IX of this Treaty.

2. The Panama Canal Commission shall not perform governmental or commercial functions as stipulated in paragraph 4 of this Annex, provided, however, that this shall not be deemed to limit in any way the right of the United States of America to perform those functions that may be necessary for the efficient management, operation and maintenance of the Canal.

3. It is understood that the Panama Canal Commission, in the exercise of the rights of the United States of America with respect to the management, operation and maintenance of the Canal, may perform functions such as are set forth below by way of illustration:

a. Management of the Canal enterprise.

b. Aids to navigation in Canal waters and in proximity thereto.

c. Control of vessel movement.

d. Operation and maintenance of the locks.

e. Tug service for the transit of vessels and dredging for the piers and docks of the Panama Canal Commission.

f. Control of the water levels in Gatun, Alajuela (Madden) and Miraflores Lakes.

g. Non-commercial transportation services in Canal waters.

h. Meteorological and hydrographic services.

i. Admeasurement.

j. Non-commercial motor transport and maintenance.

k. Industrial security through the use of watchmen.

l. Procurement and warehousing.

m. Telecommunications.

n. Protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in operation of the Canal and the anchorages.

o. Non-commercial vessel repair.

p. Air conditioning services in Canal installations.

q. Industrial sanitation and health services.

r. Engineering design, construction and maintenance of Panama Canal Commission installations.

s. Dredging of the Canal channel, terminal posts and adjacent waters.

t. Control of the banks and stabilizing of the slopes of the Canal.

u. Non-commercial handling of cargo on the piers and docks of the Panama Canal Commission.

v. Maintenance of public areas of the Panama Canal Commission, such as parks and gardens.

w. Generation of electric power.

x. Purification and supply of water.

y. Marine salvage in Canal waters.

z. Such other functions as may be necessary or appropriate to carry out, in conformity with this Treaty and related agreements, the rights and responsibilities of the United States of America with respect to the management, operation and maintenance of the Panama Canal.

APPENDIX—Continued

4. The following activities and operations carried out by the Panama Canal Company and the Canal Zone Government shall not be carried out by the Panama Canal Commission, effective upon the dates indicated herein:

(a) Upon the date of entry into force of this Treaty:

(i) Wholesale and retail sales, including those through commissaries, food stores, department stores, optical shops and pastry shops;

(ii) The production of food and drink, including milk products and bakery products;

(iii) The operation of public restaurants and cafeterias and the sale of articles through vending machines;

(iv) The operation of movie theatres, bowling alleys, pool rooms and other recreational and amusement facilities for the use of which a charge is payable;

(v) The operation of laundry and dry cleaning plants other than those operated for official use;

(vi) The repair and service of privately owned automobiles or the sale of petroleum or lubricants thereto, including the operation of gasoline stations, repair garages and tire repair and recapping facilities, and the repair and service of other privately owned property, including appliances, electronic devices, boats, motors, and furniture;

(vii) The operation of cold storage and freezer plants other than those operated for official use;

(viii) The operation of freight houses other than those operated for official use;

(ix) The operation of commercial services to and supply of privately owned and operated vessels, including the construction of vessels, the sale of petroleum and lubricants and the provision of water, tug services not related to the Canal or other United States Government operations, and repair of such vessels, except in situations where repairs may be necessary to remove disabled vessels from the Canal;

(x) Printing services other than for official use;

(xi) Maritime transportation for the use of the general public;

(xii) Health and medical services provided to individuals, including hospitals, leprosariums, veterinary, mortuary and cemetery services;

(xiii) Educational services not for professional training, including schools and libraries;

(xiv) Postal services;

(xv) Immigration, customs and quarantine controls, except those measures necessary to ensure the sanitation of the Canal;

(xvi) Commercial pier and dock services, such as the handling of cargo and passengers; and

(xvii) Any other commercial activity of a similar nature, not related to the management, operation or maintenance of the Canal.

(b) Within thirty calendar months from the date of entry into force of this Treaty, governmental services such as:

(i) Police;

(ii) Courts; and

(iii) Prison system.

5. (a) With respect to those activities or functions described in paragraph 4 above, or otherwise agreed upon by the two Parties, which are to be assumed by the Government of the Republic of Panama or by private persons subject to its authority, the two Parties shall consult prior to the discontinuance of such activities or functions by the Panama Canal Commission to develop appropriate arrangements for the orderly transfer and continued efficient operation or conduct thereof.

(b) In the event that appropriate arrangements cannot be arrived at to ensure the continued performance of a particular activity or function described in paragraph 4 above which is necessary to the efficient management, operation or maintenance of the Canal, the Panama Canal Commission may, to the extent consistent with the other provisions of this Treaty and related agreements, continue to perform such activity or function until such arrangements can be made.

APPENDIX—Continued

TREATY CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

ARTICLE I

The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.

ARTICLE II

The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equity, so that there will be no discrimination against any nation, or its citizens or subjects concerning the conditions or charges of transit, or for any other reasons, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world. The foregoing shall be subject to the following requirements:

(a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III(c);

(b) Compliance with applicable rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;

(c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and

(d) Such other conditions and restrictions as are established by this Treaty.

ARTICLE III

1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

(a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;

(b) Ancillary services necessary for transit through the Canal shall be provided;

(c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;

(d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a State or for which it has acknowledged responsibility, a certification by that State that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal shall be deemed sufficient to establish such financial responsibility;

(e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to inspection, search or surveillance. However, such vessel may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the

APPENDIX—Continued

government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this treaty.

ARTICLE IV

The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties.

ARTICLE V

After the termination of the Panama Canal Treaty, only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

ARTICLE VI

1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

ARTICLE VII

1. The United States of America and the Republic of Panama shall jointly sponsor a resolution in the Organization of American States opening to accession by all nations of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

ARTICLE VIII

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Panama Canal Treaty, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.

DONE at Washington, this 7th day of September, 1977, in the English and Spanish languages, both texts being equally authentic.

ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B),[1] and any other interoceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly or partially within the territory of the Republic of Panama, the entrances

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[1] Not printed here.

APPENDIX—Continued

thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

4. "Internal operation" encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunitions, implements of war and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation, including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that health and sanitation requirements are satisfied.

TEXTS OF SENATE CHANGES IN PACT

WASHINGTON, March 16—Following are the texts of the two major amendments and two major reservations to the Neutrality Treaty between the United States and Panama, which were incorporated in the resolution of ratification approved today by the Senate.

Adopted 84 to 5 March 10, 1978.

LEADERSHIP AMENDMENT 20

At the end of Article IV, insert the following:

"A correct and authoritative statement of certain rights and duties of the parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on Oct. 14, 1977, and by the Government of the Republic of Panama on Oct. 18, 1977, which is herein incorporated as an integral part of this treaty, as follows:

"'Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional process, defend the canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the canal or against the peaceful transit of vessels through the canal.

"'This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.'"

Introduced by Senator Robert C. Byrd on behalf of Senator Howard H. Baker Jr. and 76 other senators, adopted 85 to 3 March 13.

LEADERSHIP AMENDMENT 21

"At the end of the first paragraph of Article VI, insert the following:

"In accordance with the Statement of Understanding mentioned in Article IV above: 'The Neutrality Treaty provides that the vessels of war and auxiliary vessels

APPENDIX—Continued

of the United States and Panama will be entitled to transit the canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels through the canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the canal RAPIDLY.'"

Proposed by Senator Dennis DeConcini, Democrat of Arizona with Senator Wendell H. Ford, Democrat of Kentucky, as co-sponsor, adopted 75 to 23 today.

RESERVATION

Before the period at the end of the resolution of ratification, insert the following: "Subject to the condition, to be included in the instrument of ratification of the treaty to be exchanged with the Republic of Panama, that, notwithstanding the provisions of Article V or any other provision of the treaty, if the canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the canal or restore the operations of the canal as the case may be."

Introduced by Senator Sam Nunn, Democrat of Georgia, with 13 co-authors or co-sponsors, adopted 82 to 16 March 15.

RESERVATION

"Subject to the condition that the instruments of ratification of the treaty shall be exchanged only upon the conclusion of the protocol of exchange, to be signed by authorized representatives of both Governments, which shall constitute an integral part of the treaty documents and which shall include the following: that nothing in this treaty shall preclude Panama and the United States from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after Dec. 31, 1999, of their responsibilities to maintain the regime of neutrality established in the treaty, including agreements or arrangements for the stationing of any United States forces or maintenance of defense sites after that date in the Republic of Panama that Panama and the United States may deem necessary or appropriate."

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FEDERAL SUPPLEMENT

Volume 445

Cases Argued and Determined
in the
UNITED STATES DISTRICT COURTS
UNITED STATES CUSTOMS COURT
SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT
and Rulings of the
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

CONGRESSIONAL RESEARCH SERVICE
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1978

ants, these claims are directly contested by the affidavit of plaintiff Thomas Fogel, submitted in opposition to the motion, and therefore involve disputed issues of material fact which are incapable of resolution by summary judgment. However, plaintiffs do not contest the assertion that defendant Resort Properties, Inc., "as a matter of fact, had no connection with any of the operations mentioned in the complaint." Affidavit of Rick Ebenstein submitted in support of motion for summary judgment, p. 2. Accordingly, the complaint must be dismissed as to Resort Properties, Inc.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted to the extent that plaintiffs' claims against Resort Properties, Inc., and those causes of action alleging violations of § 1404(a)(1) of the Land Sales Act, 15 U.S.C. § 1703(a)(1), must be dismissed. In all other respects the motion is denied.

So Ordered.

Mickey EDWARDS, Member of Congress-Oklahoma, et al., Plaintiffs,

v.

James Earl CARTER, President of the United States, Defendant.

Civ. A. No. 77-1733.

United States District Court,
District of Columbia.

Feb. 20, 1978.

Certain members of House of Representatives brought action seeking declaration that President's submission of Panama Canal Zone treaties to Senate only violated their allegedly mandated right under Constitution to vote on disposition of United States property within Panama Canal Zone, and President moved to dismiss. The District Court, Parker, J., held that: (1) members did not have standing to challenge President's actions on ground that such actions encroached upon their right to vote effectively on specific rules and resolutions pending before House of Representatives, where President had not frustrated them or prevented them from voting, and (2) where possible legislative solutions were still available to members, both before and after any senate ratification and where ultimate enactment of territorial sovereignty provisions of treaties was subject to many political contingencies, all unpredictable and uncontrollable by court, members failed to demonstrate concrete and nonspeculative injury in fact to their official roles as legislators and thus did not have standing.

Motion to dismiss granted.

1. Federal Civil Procedure 🔑103

In determining whether plaintiff has standing to sue, court should inquire whether irreducible constitutional minimum of concrete injury in fact exists, whether interests asserted are arguably within zone of interests protected by relevant statute or constitutional provision, whether injury asserted is causally related to allegedly illegal action of the defendant, and whether injury is likely to be redressed by favorable decision.

2. United States 🔑135

A congressman whose vote has actually been nullified has standing to challenge action that has led to such nullification.

3. United States 🔑135

Where a legislator's official influence upon legislative process is not impaired by alleged illegality, though one channel of power or source of information may be hampered, he has no standing to entangle federal court in his general legislative difficulties; however, legislator whose vote has actually been nullified has standing where court can limit its inquiry to discrete aspect of process by which bill becomes law, mean-

ing original vote and postenactment events denying bill's legal status.

4. United States 🔑135

Members of House of Representatives who challenged President's action in submitting Panama Canal Zone treaty to Senate only rather than to Congress as a whole, alleging that President's actions encroached upon their right to vote effectively on specific bills and resolutions pending before House, did not have standing based on such alleged encroachment, where President had not frustrated or prevented them from voting and where House members only had their colleagues and themselves to blame if relevant bills and resolutions were snared in the legislative process. U.S.C.A.Const. art. 4, § 3, cl. 2.

5. United States 🔑135

Legislator who voted for statute which has been correctly enacted does not have standing on that basis alone to ensure enforcement of legislation; logic of rule, which serves to limit congressional intervention in every case interpreting federal laws, applies to enacted treaties as well as statutes.

6. United States 🔑135

Fact that legislators have been hampered in their legislative functions is not sufficient to show nonspeculative concrete injury in fact for purposes of standing to sue.

7. United States 🔑135

Where members of House of Representatives brought action challenging action of President in submitting Panama Canal Zone treaties to Senate rather than to Congress as a whole, where possible legislative solutions were still available to members both before and after any senate ratification, an where ultimate enactment of territorial sovereignty provisions of treaties was subject to many political contingencies, all unpredictable and uncontrollable by court, members failed to show nullification of their official influence upon legislative process and failed to demonstrate concrete and nonspeculative injury in fact to their official roles as legislators, and thus members did not have standing to sue. U.S.C.A. Const. art. 4, § 3, cl. 2.

Daniel J. Popeo, Joel D. Joseph, Paul D. Kamenar, Washington Legal Foundation Washington, D. C., for plaintiffs.

David J. Anderson, Steven I. Frank, Brook Hedge, Attys., Dept. of Justice, Washington, D. C., for defendant.

MEMORANDUM OPINION

BARRINGTON D. PARKER, District Judge:

Article IV, Section 3, Clause 2, of the United States Constitution provides in part that the "Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States." In this proceeding Representative Mickey Edwards and fifty-nine other Members of the House of Representatives appear in their official capacity and seek vindication of their allegedly mandated right under Article IV to vote on the disposition of United States property within the Panama Canal Zone.

Currently pending before the Senate for ratification is a treaty, signed by President James Earl Carter, which would transfer certain real property in the Canal Zone from the United States to the Republic of Panama. Plaintiffs contest the procedure by which the President seeks approval of this treaty, and one other. Specifically, they request this Court to issue a declaratory judgment that the President's actions deprive the United States of property without the prior concurrence of the entire Congress, thereby thwarting them in the performance of their duties as directed by the Constitution; and that the President should transmit the treaties to the House of Representatives for its consideration under Article IV, thereby permitting plaintiffs to exercise their constitutional and legislative duties regarding the disposition of American property within the Canal Zone. Jurisdiction here rests on sections 1331, 1361 and 2201 of Title 28 of the United States Code.

As an initial response, the defendant contends that the Court lacks subject matter jurisdiction either because the plaintiffs have no standing to sue or because the case presents a nonjusticiable political question. In addition, the President's counsel alleges that the complaint fails to state a claim upon which relief can be granted, since Congressional power under Article IV to dispose of United States property is not exclusive in the field of foreign relations, but rather concurrent with the President's Article II treaty making power. Accordingly, the defendant has moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Court has considered the memoranda and oral argument of counsel and concludes that the plaintiffs lack standing to maintain this action. The defendant's motion must be granted and the complaint dismissed for lack of subject matter jurisdiction.

Background

The 1903 Hay-Bunau-Varilla Treaty between the United States and the Republic of Panama granted to the United States perpetual rights to "the use, occupation and control" of the Canal Zone.[1] This treaty, as amended,[2] provides the basis for the present American operation, maintenance and defense of the Canal. The treaty has been a source of constant conflict between the two nations. In 1964, President Lyndon Johnson took affirmative steps to initiate renegotiation, a goal which has been pursued by subsequent administrations.

Thirteen years of negotiations culminated on September 7, 1977, when President Carter signed two treaties: the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.[3] Upon entry into force, the Panama Canal Treaty would abrogate prior treaties and the Republic of Panama would assume territorial sovereignty over all real property in the Canal Zone, including nonremovable improvements thereon. The United States would continue to operate the Canal until the turn of this century, year 2000, at which time Panama would take control. Under the terms of the latter treaty, the United States and Panama would share permanent responsibility for maintaining Canal neutrality.

While there is some question as to the status of the interests to be transferred, the Court will assume for purposes of this motion to dismiss that the treaties concern property and territory of the United States, as those terms are used in Article IV of the Constitution.

President Carter submitted the treaties to the Senate for advice and consent to ratification in September, 1977. On February 3, 1978, after extensive hearings, the Senate Committee on Foreign Relations reported the treaties to the Senate; the Committee concluded that the Panama Canal Treaty can validly transfer property of the United States without the need for implementing legislation.[4] The Senate is currently conducting debate on the treaties; if approved and ratified, they will enter into force six months after the exchange of American and Panamanian instruments of ratification.

The Question of Standing

[1] To cross the jurisdictional threshold of the federal court, the Representatives must first demonstrate their standing to seek a declaration that President Carter's submission of the treaties only to the Senate is unconstitutional. Although legislator interests and injuries are often specialized, there are no distinct standards for deter-

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[1] Isthmian Canal Convention, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.

[2] General Treaty of Friendship and Cooperation, March 2, 1936, 53 Stat. 1807, T.S. No. 945; Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, 6 U.S.T. 2273, T.I.A.S. No. 3297.

[3] For the text of the proposed treaties, *see* Dep't State Selected Documents No. 6 (Sept. 1977).

[4] Senate Comm. on Foreign Relations, Report on the Panama Canal Treaties, Exec. Rep. No. 95-12, 95th Cong., 2nd Sess. 65-69 (1978).

mining Congressional standing questions. To resolve the ultimate issue of whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976), the Court must pursue a series of inquiries. Only recently, in *Harrington v. Bush*, 180 U.S.App.D.C. 45, 60 n. 68, 553 F.2d 190, 205 n. 68 (1977), our Court of Appeals distilled four separate such questions from the Supreme Court decisions developing the standing doctrine. First, does "the irreducible constitutional minimum" of a concrete injury in fact exist? Second, are the interests asserted arguably within the zone of interests protected by the relevant statute or constitutional provision? Third, is the injury asserted causally related to the allegedly illegal action of the defendant? Finally, is the injury "likely to be redressed by a favorable decision?"

This Circuit has developed a relatively comprehensive body of law on the subject of legislator standing. A definite line between legislators with and without a sufficient injury in fact has been drawn. While the sixty plaintiff House Members do not fall neatly on either side of that line, a discussion of the division will lay the foundation for a comparative analysis.

[2] A Congressman whose vote has actually been nullified has standing to challenge the action that has led to such nullification. In *Kennedy v. Sampson*, 167 U.S. App.D.C. 192, 511 F.2d 430 (1974), the court held that Senator Edward Kennedy had standing to challenge the constitutionality of the President's exercise of a "pocket veto" on a bill passed by Congress. The court emphasized that the pocket veto had both nullified the effect of his prior vote for the bill and had circumvented his opportunity to cast an overriding vote, thus causing a specific injury to his "official legislative authority." Because a decision as to the constitutionality of the pocket veto would determine whether the bill would become law, the court was not playing a solely advisory role, outside the scope of its Article III powers. *See also Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

In contrast to *Kennedy*, the court has been reluctant to find standing where a legislator is not seeking viability for a specific vote already cast or a constitutionally prescribed follow-up vote. In the central case of *Harrington v. Bush*, House Representative Michael Harrington challenged the legality of certain activities of the Central Intelligence Agency (CIA). Citing the key language of *Mitchell v. Laird*, 159 U.S. App.D.C. 344, 488 F.2d 611 (1973), plaintiff based standing on his belief that a judicial declaration of the illegality of the activities would "bear upon" his legislative duties of impeachment and appropriations. The court unequivocally rejected the *Mitchell* relevance test and held that a Congressman who seeks a declaratory judgment of executive illegality must allege a "particular concrete injury." 180 U.S.App.D.C. at 65, 553 F.2d at 210. Congressman Harrington did not meet this initial barrier, because he could point to no action by CIA officials that had undermined his vote. Indeed, the "legislative process [was] operating in an unimpeded manner," as the House was considering numerous bills and resolutions relating to the CIA. *Id.* at 55 n. 41, 553 F.2d at 200 n. 41. In addition, since a judgment either way as to the legality of CIA activities would only assist Congressman Harrington in his general legislative duties, rather than deciding the fate of specific legislation, a judgment could serve solely an advisory function.

The importance of the *Harrington* "particular concrete injury" test was buttressed in the companion case of *Metcalf v. National Petroleum Council*, 180 U.S.App.D.C. 31, 553 F.2d 176 (1977). Senator Lee Metcalf sought to enjoin the National Petroleum Council from functioning as a federal advisory council because its advice was allegedly influenced by special interests, in violation of two federal statutes. He claimed that his duties as an individual legislator and as a subcommittee member to take "effective legislative action to correct the illegalities he perceive[d]" were impaired by receipt of biased information from the defendant. Finding this to be a generalized grievance with an unspecified prospective impact, rather than an injury in fact, the court denied standing and noted that Senator Metcalf was free to develop sources of unbiased information to assist him in his legislative role.

[3] The Court of Appeals also used *Metcalf* to clarify the distinction between the *Harrington* and *Kennedy* situations. Where a legislator's "official influence upon the legislative process" is not impaired by alleged illegality, though one channel of power or source of information may be hampered, he has no standing to entangle the federal court in his general legislative difficulties. A legislator in the *Kennedy* type case has standing, however, where the court can limit its inquiry to the "discrete aspect" of the process by which a bill becomes law, meaning the original vote and post-enactment events denying a bill's legal status. *Id.* at 44 n. 127, 553 F.2d at 189 n. 127.

Plaintiffs' Standing

The Representatives describe, somewhat ambiguously, two classes of injury for which they seek redress. Their complaint alleges that the President's failure to submit the treaties to the House has infringed their "constitutional and legislative responsibilities to dispose of property belonging to the United States." This allegation appears to encompass not only the injury inherent in actual transfer of Canal Zone property without House approval, but also the President's submission of the treaty property provisions to the Senate only. In the opposition to the motion to dismiss, they also assert a "constitutional interest in protecting the integrity of their votes" on specific bills and resolutions now pending before the House, which concern substantive and procedural aspects of Panama Canal property disposition.[5] The two concepts of injury warrant separate discussion. Because the latter presents the less difficult issues, the Court will first address that concept of injury.

Specific Bills and Resolutions Pending Before the House

[4] Plaintiffs' claim that President Carter's actions encroached upon their right to vote effectively on specific bills and resolutions pending before the House represents an attempt to come within the holding of *Kennedy v. Sampson.* The *Kennedy* court, however, was not impressed with the specificity of legislation upon which a legislator hoped to vote. Rather, the controlling factor was that Senator Kennedy's actual vote on a bill had been nullified by improper executive action; impairment of his future vote was inextricably linked to his original one. As confirmed in *Metcalf,* where the plaintiff emphasized the specificity of the subject matter involved, "[i]t is the *injury* which must be specific, *not* merely the interest on which the injury has been inflicted." *Id.* at 43, 553 F.2d at 188.

However specific the bills and resolutions here, plaintiff Representatives are in no stronger a position for standing than were Senator Metcalf or Representative Harrington. President Carter has not frustrated or prevented them from voting. If the relevant bills and resolutions are snared in the legislative process, they have only their colleagues and themselves to blame. *See Reuss v. Balles,* 73 F.R.D. 90, 94–97 (D.D.C. 1976), *appeal pending,* No. 77–1012 (D.C. Cir.). The Court recognizes that plaintiffs might welcome a judicial declaration of the constitutional status of the defendant's actions before considering or voting on the legislation now pending. However, since a judicial decision concerning the bills and resolutions would not determine whether the territory is to be transferred or even whether the House merits a vote on the actual Panama Canal Treaties, such a decision would exceed the Court's Article III powers.

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[5] Three bills (H.R. 9815, H.R. 8957, H.R. 8790) and eleven resolutions were all introduced in the 95th Congress, 1st Session.

The Court also recognizes that a Senate vote on the treaties could undermine the effectiveness of a House vote on the now pending bills and resolutions. In response to this dilemma, however, the Court points out that it would be improper for the federal judiciary to attempt to schedule the legislative process. Nor will the Court attempt to monitor the interrelationship of the House and Senate, particularly since the latter body is not a party to this litigation.

Panama Canal Treaties

The heart of this action is plaintiffs' alleged constitutional right to cast an effective vote on the treaty provisions transferring American territorial control of Canal Zone property. The asserted injury to the Representatives arises from the President's attempt to modify the status quo of property and territory ownership, as established by past treaties and legislation, without a House vote. This injury would magnify in the immediate future if the treaties are ratified. So articulated, the plaintiffs have suffered an injury to their role in the legislative process under Article IV. However, to support standing, they must further demonstrate a concrete and nonspeculative injury in fact to their official roles as legislators.

[5] Plaintiffs' alleged injury does not fall into either of the legislative standing categories. They concede that defendant has not nullified the effect of any votes already cast by them,[6] as happened in *Kennedy.* Unlike the circumstances in *Harrington,* they have not brought this suit for guidance on general appropriations or potential impeachment proposals; their injury is not a lack of unbiased information "bearing upon" their legislative roles.

Plaintiffs argue that their situation is more akin to that presented in *Kennedy* than in *Harrington.* The effectiveness of Senator Kennedy's vote was impaired by executive action taken after his vote was cast; the effectiveness of their votes has been aborted by Presidential action circumventing the role of the House. The difference in timing aside, plaintiffs claim that their disenfranchisement is equally as real and objective.

[6] In essence, the House Members are asking the Court to interpret Article IV to mean that the House is entitled to vote on the same provisions concerning property disposition at the same time as the Senate. Such an interpretation would contradict the *Kennedy* standing requirement that a legislator must demonstrate interference with his official influence on the legislative process. Without attempting to usurp plaintiffs' legislative functions, the Court notes that they have been and are now free to introduce, consider and vote on legislation paralleling the Panama Canal Treaty, to determine if a majority of the House approves transfer of territorial sovereignty.[7] This approach is admittedly more difficult than voting on provisions submitted by the President to the House. However, since the issue is whether the President has usurped plaintiffs' constitutional right to vote, the comparative facility of different methods of voting is not determinative. Just as in *Harrington* and *Metcalf,* the fact that legislators have been hampered in their legislative functions is not sufficient to show a nonspeculative concrete injury in fact.

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[6] At the oral argument, counsel for plaintiffs suggested that the President's action undermined Congressional enactment of Article V of the 1955 Panama treaty, which provides for the transfer of certain real property to the Republic of Panama "subject to the enactment of legislation by the Congress." A legislator who voted for a statute which has been correctly enacted does not have standing on that basis alone to ensure enforcement of the legislation. *See Metcalf,* 180 U.S.App.D.C. at 40, 553 F.2d at 185; *Harrington v. Schlesinger,* 528 F.2d 455, 459 (4th Cir. 1975); *McRae v. Mathews,* 421 F.Supp. 533, 540 (E.D.N.Y.1976). The logic of this rule, which serves to limit Congressional intervention in every case interpreting federal laws, applies to enacted treaties as well as statutes.

[7] The Court is in no way implying that plaintiffs would have standing if the House had passed a resolution on the proper procedural role of the House or on the merits of Canal Zone territorial sovereignty transfer. *See* the discussion of institutional and derivative standing in *Harrington,* 180 U.S.App.D.C. at 54 n. 41, 553 F.2d at 199 n. 41.

Plaintiff Representatives apparently would distinguish *Harrington* on the grounds that Congressional information sources and CIA appropriations are matters more amenable to legislative control than disposition of Canal Zone property. They would point to the "shall vote" language of Article IV to protect their right to have the relevant provisions submitted to them by the President. Precedent, however, demonstrates that plaintiffs overestimate the importance of Article IV to their claims of standing.

This court rejected a similar claim based on Article IV in *Public Citizen v. Sampson*, 379 F.Supp. 662 (D.D.C.1974), *aff'd without opinion*, 169 U.S.App.D.C. 301, 515 F.2d 1018 (1975), where several Congressmen challenged General Services Administration (GSA) regulations which authorized agencies to grant rights to patents and inventions developed with federal funds. The court dismissed their complaint for lack of standing, finding that promulgation of the regulations did not cause an injury in fact to plaintiffs in their legislative roles, since it was "beyond peradventure that plaintiff Congressmen could tomorrow propose legislation regulating the contractual authority" of GSA. 379 F.Supp. at 667.

[7] Admittedly, patents do not rival territorial sovereignty over the Panama Canal Zone in importance. However, an argument that the Court should not apply the holding in *Public Citizen* to this more consequential case proves too much, given that the sovereignty issues here owe their dramatic significance to the foreign policy context in which the case arises. This is not to say that interpretation of Article IV, where that Article allegedly conflicts with the President's treaty making powers, is a nonjusticiable political question. Rather, considering that plaintiffs do have legislative avenues open to them in a situation rooted in international relations, the Court justifiably follows the precedent of *Public Citizen* to find that plaintiffs have not demonstrated concrete injury in fact. Nor is the Court saying plaintiffs are not entitled to a judicial remedy because they can pursue alternative legislative solutions. Instead, because their official powers as Representatives remain undiminished in substance, they have not suffered a particularized, nonspeculative injury in their capacity as legislators. *See Metcalf*, 180 U.S.App.D.C. at 44 and n. 129, 553 F.2d at 189 and n. 129.

In a second relevant case, *Pressler v. Simon*,[8] Representative Larry Pressler alleged that two acts establishing procedures for adjusting Congressional pay rates, without the traditional requirement of specific legislation, violated the Article I, Section 6, cl. 1, requirement that Congressmen "shall receive a Compensation for their Services, to be ascertained by law." Before dismissing the case on the merits, the court found that Representative Pressler did not have an injury in fact for standing purposes at least until his salary had actually been adjusted by operation of the acts. Until that time, even though nonlegislative salary recommendations were imminent under the acts, any injury was "far too speculative" to support standing.

Plaintiff Representatives here allege a similarly speculative injury. True, like Representative Pressler, they have a legitimate interest in their alleged constitutional mandate to vote. However, the Court cannot focus on an impairment to that interest until exact contours of the injury are defined, until an event equivalent to the automatic adjustment in Representative Pressler's salary has occurred.

The President did submit the treaties to the Senate in September of 1977, thereby revealing his decision to bypass a House vote. However, many contingencies remain between submission and entry into force of the treaties. The House is free to vote on and perhaps approve property provisions parallel to those of the treaties. The Senate may yet enact treaty amendments requiring full Congressional authorization for transfer of American property.[9] The Senate could disapprove the treaties or require amendments unacceptable to the Republic of Panama. Diplomatic problems could arise before or after exchange of instruments of ratification.

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[8] 428 F.Supp. 302 (D.D.C.1976) (three-judge court); *vacated and remanded for reconsideration in light of new legislation*, 431 U.S. 169, 97 S.Ct. 2162, 52 L.Ed.2d 216 (1977); *Order reinstating prior opinion*, C.A. No. 76–782 (D.D.C. July 19, 1977); *dismissal aff'd*, — U.S. —, 98 S.Ct. 758, 54 L.Ed.2d 776 (1978).

Postulating that these events will not come to pass, plaintiffs deny that a judicial opinion will be only advisory at this point in time. The Court is not prepared to second-guess the political contingencies inherent in the treaty making and legislative processes. Nor can the Court now assess plaintiffs' contention that ratification means a *fait accompli*, protected from judicial interference.

In short, the Court finds plaintiffs' injury too speculative to fulfill the injury in fact requirement of standing. A declaratory judgment on the constitutional right of the House to vote on the territorial sovereignty provisions would be abstract if the treaties met a political death in the House, the Senate or the executive branch. Insofar as plaintiffs' object to an actual transfer of American property without House approval, the listed contingencies grow in significance. *See Helms v. Vance*, No. 77-83 (D.D.C. Mar. 23, 1977), *aff'd mem.*, No. 77-1295 (D.C.Cir. May 3, 1977).[10]

Summary and Conclusion

The sixty House Members have not suffered a concrete nonspeculative injury in fact to their right to vote on the Panama Canal treaties. Possible legislative solutions are still available to them, both before and after any Senate ratification. They have not shown nullification of their official influence upon the legislative process. Further, the ultimate enactment of the territorial sovereignty provisions of the treaties is subject to many political contingencies, all unpredictable and uncontrollable by this Court. In the words of the Supreme Court,

> [t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222, 94 S.Ct. 2925, 2933, 41 L.Ed.2d 706 (1974).

Because plaintiffs have not met the "irreducible constitutional minimum" of a concrete injury in fact to their legislative roles, they do not have standing and no further inquiry is necessary. The Court lacks subject matter jurisdiction and the defendant's motion to dismiss must be granted.

Ordered accordingly.

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[9] Two such amendments were introduced in the Senate Foreign Relations Committee: Amendment No. 16 to Ex. N, 95-1 (Jan. 26, 1978); Reservation No. 2 to Ex. N, 95-1. These were both tabled. Report, *supra* note 4 at 123. They are, however, subject to reintroduction to the full Senate.

[10] *Helms* was a similar suit brought by Congressmen before the President had submitted any treaties to the Senate. In an opinion dismissing the suit as premature, the Honorable Thomas Flannery considered the contingency of Senate ratification to be a ripeness factor. In the instant case, as often happens in discussions of justiciability under Article III, this Court's finding that any injury to plaintiffs is too speculative for standing purposes overlaps with the ripeness doctrine.

The above discussion is equally applicable to plaintiffs' suggestion at oral argument that their right not to act with respect to disposition of American property in the Canal Zone is being injured. Any such injury will occur, if at all, only at the point in time when the property is actually transferred.

VIII. BUDGETARY ISSUES

INTRODUCTION: POLITICALLY INSPIRED ESTIMATE

The Congressional Budget Office has estimated that the INF Treaty would save the U.S. taxpayers $1 billion annually. The complete CBO estimate is included as annex A to this section.

It is difficult to take the CBO estimate seriously. CBO failed to render any true in-depth analysis of the Treaty costs. Its analysis of the direct costs is grossly incomplete; it scarcely takes into consideration the indirect costs.

A key example of its failure to face facts honestly is the fundamental assumption of the CBO study that civilian and military manpower costs would be reduced as a result of the fact that the INF Treaty eliminates not only the specified intermediate-range systems, but also the civilian and military employment associated with producing and maintaining those systems.

Civilian employment will indeed be eliminated, a fact which must be taken into consideration by Senators whose constituents will lose their livelihoods. But Department of Defense manpower levels will *not* be reduced by the Treaty, a fact which has been affirmed to the General Accounting Office by DOD. DOD end-strengths will remain the same, or even increase, since compensating steps will have to be taken to repair NATO defenses in Europe once the INF systems have been eliminated.

The CBO estimate of $1 billion saved annually is a politically inspired estimate that cannot be given serious consideration. When the cost of repairing the damage to U.S. and NATO security is taken into consideration, the true total cost will be close to $300 billion over the 13-year period covered by the Treaty.

DIFFICULTIES OF OBTAINING A TRUE ESTIMATE

The computation of a true estimate of the INF Treaty costs cannot be accomplished easily. Indeed, some of the problems are real, but some reflect the reluctance of the executive branch to assist the legislative branch in its constitutional duties. Nevertheless, even taking into consideration the fact that many cost elements are not available or have been denied by the executive branch, a true accounting would show that direct and indirect costs of the Treaty will amount to a minimum of $263 billion over the 13 years of the effective life of the Treaty, and perhaps as much as $326 billion.

Soon after the December 8, 1987, ceremony in which the Treaty was signed, it became obvious that no one in the Executive Department had bothered to ascertain how much the proposed new Treaty would cost the American taxpayers. Such an oversight is not surprising at the Department of State, which has little sympathy for the overburdened taxpayer to begin with; but what is surprising is the zeal of the Department of Defense to erect roadblocks before the legitimate inquiries of the Senate and the General Accounting Office. Annex items B through K contain 11 items from correspondence which I have had with the Comptroller General, CBO, and others, attempting to get a proper picture of the costs of this treaty to the American taxpayers. The GAO estimate of the cost of the systems to be destroyed is included as annex item I.

The Department of Defense was particularly obdurate in avoiding cooperation with GAO efforts to audit Treaty costs. Only after the intervention of the Department of Defense Inspector General did the GAO gain access even to rudimentary data concerning the direct costs of Treaty implementation—data which was promptly classified "secret" for no apparent purpose other than to prevent the public from knowing a significant element of Treaty expense.

ELEMENTS OF A TRUE ESTIMATE

The elements of a true estimate should include the following:

1. The costs already spent on systems to be eliminated, corrected by certain elements of cost avoidance, such as equipment not required to be eliminated and usable elsewhere.

Cost: Pershing II—$2.9 billion net; Pershing I—$2.0 billion net; GLCM's—$3.1 billion net; total—$8.0 billion net.

2. The costs of direct Treaty compliance, i.e., destruction of delivery vehicles and prohibited launcher components, onsite inspection, diplomatic review, etc.

Cost: Classified; media reports say $200 million a year, or $2.6 billion over 13 years.

3. The estimated cost of enhancing, without enlarging, the present NATO force structure.

Cost: $17 billion annually, $221 billion over 13 years.

4. The cost of modernization of non-INF NATO nuclear systems.

Cost: Not available.

5. The cost of deploying effective passive countermeasures against Soviet chemical/bacteriological weapons.

Costs: Not available.

6. The cost of enhancing the present NATO force structure by adding at least one new armored division in Europe.

Costs: $3.7 billion to equip and $34 billion over 13 years.

7. The cost of enhancing the present NATO force structure by adding at least one new mechanized infantry division in Europe.

Costs: $3 billion to equip and $28 billion over 13 years.

8. The cost of developing and deploying so-called future systems based on new weaponry principles.

Costs: Secret, not available.

9. The cost of enhancing verification by additional deployment of national technical means (NTM).

Costs: Classified; press reports say $2 billion per year or $26 billion over 13 years.

10. The cost of a new national mobilization base for the United States, required by a new strategy for NATO, including:

a. New mobilization manpower goals;
b. New requirements for already deficient sealift;
c. New requirements for already deficient airlift;
d. Maintenance of industrial base capacity to meet surge requirements similar to World War II.

Costs: Unidentified.

11. Cost impact on the civilian sector, including:

a. Lost investment in plant and equipment caused by suspending production of systems prohibited by the treaty;
b. Regional impact of production jobs lost;
c. Lost corporate and personal income tax revenues;
d. Cost of contract termination clauses;
e. Lost values in publicly traded stocks.

Costs: Unidentified.

Summary:

Total 13-year costs, excluding NATO force increases: $263.3.

Total 13-year costs, including two new divisions: $326.3 billion. All dollars—1989.

COSTS OF SYSTEMS TO BE ELIMINATED

The costs of the systems to be destroyed are fairly well known because it is difficult to conceal the amounts of taxpayers dollars already expended.

Pershing II.—According to GAO, the Pershing II missiles deployed in Europe have cost the American taxpayer $3.1 billion in 1989 dollars. If the INF Treaty is ratified, this investment (less certain elements of cost avoidance; e.g., equipment not required to be eliminated and usable elsewhere) will be eradicated. With the investment at $3.1 billion, and cost avoidance at $1.2 billion, the net cost to the taxpayers in destroying the Pershing II's will be at least $1.9 billion in 1989 dollars.

Pershing I.—The Department of Defense either could not or would not provide to the GAO any system acquisition reports (SAR's) for the Pershing I. The GAO was therefore unable to estimate the cost to taxpayers occasioned by the destruction of these missiles. Since these missiles were transferred to West Germany, it may also be technically correct to say that they are no longer U.S. Government property, and, since they do not belong to the people of the United States, their elimination cannot now properly be considered a cost to U.S. taxpayers. Nevertheless, they represent a cost to the taxpayers, before transfer, probably exceeding $2 billion in 1989 dollars.

GLCM.—To date, GLCM's deployed in Europe have cost the American taxpayer $4.1 billion in 1989 dollars. The GAO estimates cost avoidance for the GLCM at $950 million in 1989 dollars, with the net cost to taxpayers for destroying the GLCM's at $3.1 billion in 1989 dollars.

THE COSTS OF DIRECT TREATY COMPLIANCE

The direct costs of treaty compliance are known to both sides. These include the actual cost of destruction of the designated delivery vehicles, the salaries of personnel involved in onsite inspection, the training of personnel, the construction of housing and technical facilities, transportation, counterintelligence, and so forth.

Despite the fact that no secret information is involved, with the exception of counterintelligence activity, the Department of Defense has chosen to classify the cost information to prevent the American public from knowing how much they are paying to destroy their property. Another reason may be that no legislation authorization exists for the compliance agency set up by the Secretary of Defense. The Secretary is using funds authorized for another purpose, and may be in violation of the Anti-Deficiency Act.

Nevertheless, the news media have reported that the direct cost of INF Treaty implementation will be about $200 million annually, or about $2.6 billion over 13 years.

THE COST OF ENHANCING, WITHOUT ENLARGING, THE NATO FORCE STRUCTURE

The present level of the NATO conventional force structure was planned on the assumption that fundamental deterrence against Soviet/Warsaw Pact aggression would rest upon the strategic nuclear deterrent. The nuclear deterrent has been viewed as the cheaper alternative to the massive expenditures which would be necessary to match Soviet/Warsaw Pact conventional deployments.

Even this cheaper alternative is not cheap. For several years, now, the Department of Defense has classified all reports relating to expenditures for the defense of Europe. The method of calculation of such expenditures is variable, since the United States does not maintain an independent force for Europe, and allocations of the defense budget must be made on the basis of fundamental assumptions. Nevertheless, the Department of Defense has told the Armed Services Committee that approximately 60 percent of its budget is directly or indirectly allocated to European defense—a sum of approximately $170 billion per year, or about $477 million per day.

With the removal of the INF systems from Europe, however, even that enormous sum is inadequate to meet the challenge presented by the Soviet/Warsaw Pact enemy in Europe. The problem was stated succinctly by the 1988 Resolutions of the Association of the United States Army:

> Without these missiles, NATO's flexibility to threaten the Russian homeland is limited to strategic forces. On the other hand, elimination of Soviet medium-range missiles still leaves them with the capability to reach all of Western Europe without resorting to their own strategic weapons. With such a marked deminution of NATO's war-fighting options, the importance of strengthening conventional forces takes on added significance * * * the drawndown of NATO's nuclear capability threatens to increase the risk of conventional conflict in Western Europe. *Regional stability can be guaranteed only by an increase in conventional capabilities to offset the proposed degradation of our nuclear deterrent.*

Both the present and past incumbents in the post of Supreme Allied Commander in Europe (SACEUR) have emphasized that the removal of the nuclear deterrent would require a costly upgrade of conventional forces.

For example, the current SACEUR, Gen. John R. Galvin, expressly stated on January 22, 1988, that the proposed treaty carries "more risk than we ought to be ready to take" unless that risk is offset by the spending needed to upgrade the NATO conventional arsenal as well as to modernize battlefield nuclear weapons. Later, he told the Committee on Foreign Relations: "In general, since 1973, the size of the Soviet military machine facing NATO has grown almost 50 percent, while NATO forces grew little more than 10 percent."

Moreover, his predecessor, Gen. Bernard Rogers told the Committee on Foreign Relations: "Only at the strategic nuclear level has the Alliance maintained an adequate force * * * NATO's deficiencies are apparent, and I think most dangerous at the level of conventional forces * * * under *optimal* conditions we can hold them for less than 2 weeks."

This view is accepted as accurate by virtually every authority on national defense budgeting, including the distinguished chairman of the Committee on Armed Services, Senator Nunn, who testified, "NATO's primary problem is the conventional disparity in favor of the Soviet Union and the Warsaw Pact."

Mr. Sven F. Kraemer, former Director of Arms Control, National Security Council Staff, stated on February 19, 1988:

> We know that this treaty will be extremely expensive. It will be expensive not only in verifying, but in dismantling, at a cost of hundreds of millions of currently unbudgeted dollars. It will also be extremely expensive in terms of the conventional force buildup and the modern forces, including, for example, dual-capable aircraft, antitactical ballistic missiles and so on that we should deploy to make up for the INF Treaty's elimination of NATO's only deterrent that could surely and rapidly reach from Western Europe straight into the Soviet Union.

It is quite clear, therefore, that significant increases in NATO spending must be made to meet the Soviet/Warsaw Pact threat in Europe. Without even increasing NATO force levels in Europe, major modernization of present equipment is needed. This includes not only modernization of battlefield nuclear weapons (such as the LANCE missile), but modernization of armored forces, sustainability improvements (such as increasing ammunition stocks) enlargement of lift capacity, improvements in contingency plans for evaluation of dependents.

It is also clear that the cost of these improvements must be paid by the American taxpayer. As the Netherlands defense minister, Jan van Houwelinger, recently told the Western European Union, "all the [European] NATO countries face a growing gap between their defense commitments and the resources they are willing to devote to defense."

It is difficult to quantify the cost of the necessary improvements when both the United States and Europe have been avoiding the hard decisions of what will be needed. But it seems reasonable to assume that a sudden and intense upgrading of present forces would require at least a 10 percent increase as a minimum in the estimated $170 million now dedicated to the defense of Europe.

Without even considering an increase in NATO forces, the upgrading of the present forces would therefore cost the American taxpayer a minimum of $17 billion per year, or $221 billion in 1989 dollars over the 13-year life of the treaty.

THE COST OF MODERNIZING NON-INF NATO NUCLEAR SYSTEMS

During the hearings on the Treaty, many witnesses justified the removal of the Pershing II's and the GLCM's on the grounds that NATO would still have "more than 4,000 nuclear warheads." Under closer scrutiny, however, it soon became clear that only a handful of these so-called 4,000 nuclear warheads had any potential for ever being delivered to targets in the Soviet Union. Most of them are battlefield weapons which would be used against advancing enemy forces, but which could not strike a strategic blow against Soviet command and control centers and other military targets. As a deterrent for preventing war, they are useless.

Nevertheless, battlefield nuclear weapons are important in the context of a war which is already begun—a situation which will be far more likely with the removal of the INF strategic deterrent. Five years ago, NATO agreed, for example, that the LANCE missile would have to be modernized. Yet today Europeans are saying that the decision to implement this agreement can be postponed until after the INF missiles have been eliminated.

Yet there is no agreement on the meaning of "modernization." Does it mean enhanced-radiation warheads? Does it mean improved range? Does it mean a reduced infrared signature? Does it mean replacing aging warheads?

Since NATO collectively and the United States alone have been avoiding these hard decisions, it is impossible to put a price tag on something we know will have to be done. Therefore the cost of these improvements has been included in the 10-percent overall increase cited above.

THE COST OF COUNTERMEASURES AGAINST CHEMICAL WEAPONS

Once the Pershing II's are gone, the Soviets will have no reason to withhold the use of chemical and bacteriological weapons. The Soviet Union has the largest stockpile of chemical and bacteriological weapons in the world. These weapons are in line with their stated objective of capturing the economic infrastructure of the enemy intact, after destroying military and civilian command and control.

Not only does NATO have no such weapons stockpiled, but it does not even have adequate equipment to take countermeasures. Such countermeasures would be completely passive, completely defensive without engaging in such warfare ourselves. Unless we immediately undertake massive expenditures to provide passive countermeasures against this Soviet barbarity, U.S. soldiers and their families, and those of our allies, will be faced with a particularly gruesome and agonizing death.

Once again, however, there are no estimates of the cost of developing such passive countermeasures. This cost would be included in the 10-precent general increase noted above.

THE COST OF ADDING AT LEAST ONE NEW ARMORED DIVISION

The Soviet/Warsaw Pact forces have 200 or more motorized rifle and tank divisions in active service in Europe. The United States has six mechanized infantry and four armored divisions in Europe. Up until the present, this disproportion has been justified on the grounds that the Pershing II's were sufficient to provide a deterrent to war. But the removal of the Pershing II's leaves our infantry and armored divisions exposed to the full power of the massive Soviet deployment.

With the removal of the Pershing II's, our forces in Europe are exposed to the full assault of the massive Soviet deployment. Many experts feel that U.S. forces, under those crcumstances, are inadequate to meet the overwhelming threat. Either the United States troops should be removed to relative safety in the United States, or our troop levels should be increased so that they would have a fighting chance against a Soviet assault.

The very minimum increase would be one additional armored division. According to data supplied by the Congressional Budget Office, the cost to the American taxpayers of one additional armored divisions over 13 years would be $34 billion. In addition, according to figures supplied by the Department of Army, there would be an initial expenditure of $3.7 billion to equip the new armored division. Thus the total of even this slight increase would be $37.7 billion.

THE COST OF INCREASING NATO FORCES BY ONE MECHANIZED INFANTRY DIVISION

Either as an alternative or an addition to a new armored division, the United States could field an additional mechanized infantry division in Europe. A mechanized infantry division is still a heavy division, but has more flexibility and slightly less power than an armored division. It would be slightly cheaper than an armored division, according to CBO figures. Over 13 years, it would cost $28 billion, with an initial investment of equipment costing $3 billion.

THE COST OF DEVELOPING "FUTURE SYSTEMS"

During the hearings, both in the Foreign Relations Committee and in the Armed Services Committee, it became evident that certain types of "futuristic" defense programs, already in development, may have been inadvertently banned by the Treaty. Questions were raised about "remotely piloted vehicles" and "hypervelocity guide vehicles" which might use nonnuclear weapons technology. Ambassador Glitman testified that the negotiators were unaware of some of these technologies until months after the Treaty was signed in Geneva.

If such "futuristic" systems are banned under the Treaty, then present development costs will have been wasted. One program, has been discussed openly by administration officials, indicating that $200 million has already been spent.

If "futuristic" systems are not banned, then they provide one avenue of redressing the imbalance in conventional warfare with conventional weapons delivery systems of great speed and accuracy. Needless to say, any major new programs will require additional billions of investment, but no estimate can be made at this time.

THE COST OF ENHANCED VERIFICATION

Monitoring Soviet activity on sites available for onsite inspection can be done without difficulty, particularly since it is doubtful that the Soviets would engage in illegal activity on those sites. It is much more difficult to detect illegal activity offsite, taking into consideration the fact that the Soviet Union has a large land mass. This kind of detection must be done by our national technical means (NTM), as pointed out by the distinguished chairman of the Senate Select Committee on Intelligence, Senator Boren.

As Senator Boren told the Committee on Foreign Relations:

> The burden of detecting banned activities at undeclared sites, where they are most likely to occur, will fall on national technical means of verification.
>
> * * * * * * *
>
> Verifying the INF Treaty's ban on all Soviet ground-based missiles for weapon-delivery with ranges of 500–5,500 kilometers will require that we monitor Soviet missile testing, production, and deployments with the best national technical means available.

Finally, it must be noted, inevitably, that getting the best NTM possible is going to cost the taxpayers a lot of money. As Senator Boren noted:

> The committee accordingly recommends that the Congress authorize and appropriate funds required to initiate a long-term program to modernize and improve upon current plans for intelligence collection. It specifically recommends investing more in programs that would be most helpful in verifying a START Treaty, in preventing technological surprise, and in supporting U.S. policy and operations in crises.

Needless to say, the programs discussed by Senator Boren are highly classified. However, there has been much speculation in the press about the need to enchance our national technical means. This speculation does not necessarily coincide with the classified issues discussed by the chairman of the Intelligence Committee. But some idea of the range of issues is available in the public debate.

For example, on April 5, 1988, the Washington Times reported:

> The Senate Intelligence Committee has requested $12 billion for six top secret radar-imaging satellites and other high-technology spy machines it says are necessary to verify Soviet compliance with new arms accords.
>
> * * * * * * *
>
> The panel has linked its approval of the INF treaty, which must be ratified by two-thirds of the Senate, and of a Strategic Arms Reduction Talks agreement now under negotiation to enactment of a secret INF-START Intelligence Monitoring Supplement Appropriation, the intelligence sources said.
>
> The panel recomends adding $2 billion each fiscal year until 1995 to the U.S. intelligence budget for improvements in na-

> tional technical means of vertification—arms control jargon for spy satellites and other technical information collectors, the sources said.

A further report in the Washington Post, April 6, 1988 stated:

> Only members of the Intelligence Committees and a few influential Senators such as Nunn are aware that the first Indigo-Lacrosse satellite—the "first ball"—was actually supposed to be launched on the space shuttle in October 1986. It was to have been a verification tool for INF as well as START . . .
>
> Boren, the Senator most committed to Indigo-Lacrosse, told us the onsite inspection system agreed to for the first time in the INF Treaty would be "no good at all" to verify START. Refusing to spell out any details of Indigo-Lacrosse, he told us that two new mobile strategic missiles now being deployed by the Soviets make onsite inspection useless as a guarantor against cheating.

These press reports at least indicate the importance of enhancing our present National Technical Means, and suggest that an estimate of $2 billion per year for 6 years, or $12 billion total, is conservative. More likely a continuous upgrade will be requested throughout the life of the Treaty, costing $26 billion over 13 years.

THE COST OF A NEW NATIONAL MOBILIZATION BASE

The removal of the Pershing II's is tantamount to a major shift in NATO strategy. The strategy, for one thing, will now have to depend much more on mobilization of conventional forces, augmentation of forces as needed, supply, and resupply. The doctrine of flexible response is virtually meaningless in the new environment because the range of options has been drastically altered.

With war in Europe more probable, we must begin to ask ourselves what is needed for a post-INF conventional defense of Europe. Among the questions are the following:

1. What will be the new mobilization manpower goals?
2. What will be the new requirements for sealift, especially since our present sealift capacity is already deficient?
3. What will be the requirements for airlift, expecially since our present airlift capacity is also deficient?
4. What industrial base will have to be maintained to support a surge of demand for war material, as we experienced in World War II?
5. What will these requirements cost?

There is no answer to the last question since no one has thought seriously about the first four. Yet these are basic elements of preparedness for conventional warfare. If we are not prepared to answer these questions, then we should be prepared to abandon Western Europe to the Soviet zone of influence.

COST IMPACT ON THE CIVILIAN SECTOR

Finally, there remains the issue of overall cost to the economy resulting from idle plants and lost employment at civilian facilities engaged in manufacturing or supporting the INF systems to be eliminated.

How much of the sunk cost in civilian plants and equipment dedicated to these systems will be rendered valueless?

How many jobs will be lost, and in which regions?

What tax revenues from jobs and corporate income associated with the Treaty will disappear? What impact will this have on the revenues of State and local jurisdictions?

How much will be paid out of the Treasury under contract termination clauses?

What publicly traded stocks will drop in value and by how much?

These are real questions, with no real answers. However, these costs are not included in the $300 billion estimate.

The annexes follow:

1. Helms letter also dated January 13, 1988, to the Comptroller General requesting on an urgent basis a detailed cost analysis of the fiscal impact of the proposed Treaty, if ratified;
2. Helms letter dated February 22, 1988, to the Comptroller General expressing dismay that the General Accounting Office (hereinafter the "GAO") had thus far been unable to obtain from the Department of Defense *any* cost data whatsoever;
3. Helms letter dated February 22, 1988, to the Comptroller General asking for a formal opinion regarding whether persons unknown at the Department of Defense had violated the criminal provisions of the Anti-Deficiency Act by diverting funds to prepare for INF Treaty compliance even though such Treaty was not ratified nor had funds been appropriated for such purpose;
4. Helms letter dated February 22, 1988, to the Comptroller General requesting a report on the shredding, on or about February 17, 1988, of a large quantity of internal documents at the Arms Control and Disarmament Agency;
5. Congressional Budget Office (hereinafter the "CBO") letter dated March 10, 1988, to the Hon. Claiborne Pell purporting to provide an estimate of the *savings* to be achieved if the proposed Treaty were ratified;
6. Helms letter dated March 11, 1988, to the Acting Director of the CBO requesting (a) backup documentation for the initial CBO estimate, (b) a reestimate assuming no reductions in personnel end-strengths, and (c) further estimates based on more realistic assumptions involving conventional force modernization and enhancement;
7. Helms letter also dated March 11, 1988, to the Comptroller General stressing the importance of proceeding expeditiously with GAO efforts to develop a plenary cost estimate and asking the GAO to review the initial estimate of the CBO;
8. Helms letter also dated March 11, 1988, to the Hon. Sam Nunn transmitting the CBO initial estimate and requesting comment on the CBO assumption of a 25,000 reduction in Defense personnel end-strengths;
9. GAO report dated March 24, 1988, providing partial data on Treaty costs;
10. CBO letter dated March 28, 1988, to the Committee on Foreign Relations providing backup documentation for the ini-

tial CBO estimate and partial data on costs of conventional force enhancement;

11. Helms letter dated March 28, 1988, to the Acting Director of the CBO again requesting net total Treaty costs assuming no reductions in personnel end-strengths and a classified annex providing net total costs of anticipated National Technical Means (hereinafter "NTM") upgrades necessary for Treaty verification;

12. CBO letter dated April 12, 1988, providing additional cost analysis without assumptions of reduction in DOD personnel end-strengths;

13. Helms letter dated April 12, 1988, to the Congressional Budget Office requesting clarification of certain cost estimates; and

14. Helms letter dated April 12, 1988, to the Hon. David Boren, Chairman, Senate Select Committee on Intelligence, requesting a classified estimate of the cost of anticipated NTM upgrades for inclusion in the classified annex to this report.

Comment copy

Item A

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN
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United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

January 13, 1988

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Comptroller General:

As you probably know the proposed treaty on intermediate-range nuclear forces which will soon be before the Senate Committee on Foreign Relations calls for the destruction of 689 intermediate-range missiles and 170 shorter-range missiles of other types together with the reprocessing of approximately 859 nuclear warheads now on those missiles.

On an urgent basis, I request for the use of the Committee a detailed cost analysis of the fiscal impact of proposed actions. Specifically I ask that this analysis include the actual cost of missile destruction and warhead reprocessing plus the lost investment in research, development, test, and evaluation (RDT&E), procurement, personnel and personnel training, and military construction associated with each system to be eliminated.

I also seek in your analysis the loss to the United States in terms of lost employment, lost taxes, and sunk costs in civilian plant and equipment which will no longer be utilized.

Obviously against these costs should be offset various savings including, for example, the savings in operation and maintenance expenses which will eventually accrue should these systems cease to be operated and maintained.

Finally, I seek your estimate of the expense of raising conventional and chemical force levels to compensate for the conventional imbalance in NATO which will result from the destruction of these nuclear systems. I recognize that such an estimate is difficult in that it requires subjective judgments not within the province of the General Accounting Office. Accordingly, please base this last estimate on the assumption that parity is achieved when there is equality in manuever divisions between the following two force levels: 1) all NATO and U.S. divisions wherever based, and 2) all Warsaw Pact and Soviet divisions wherever based. For purposes of this estimate please include reserve divisions of both sides and assume for mobilization of both sides to obviate questions of division categories in the case of the Soviet Union and Warsaw Pact and the various issues of division readiness in NATO and the U.S.

Although this last estimate requested is clearly abstract, it should nevertheless be extremely useful to the Committee in developing a general concept of the potential effect of the proposed treaty on the federal budget.

To the extent that some of the foregoing information is developed more quickly than other elements, please provide the data developed as soon as possible rather than waiting for a completed and final report. I would like to have this information in hand by January 25, 1988, on which day the Secretary of State is scheduled to testify on the treaty before the Committee.

With very best regards, I am

Sincerely,

Jesse Helms

JESSE HELMS
By hand/Urgent

Item B

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN

JOSEPH R. BIDEN, JR., DELAWARE
PAUL S. SARBANES, MARYLAND
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GERYLD B. CHRISTIANSON, STAFF DIRECTOR
JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

February 22, 1988

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Comptroller General:

I am distressed that I have yet to receive any substantive response to my letter to you of January 13, 1988, concerning an analysis of the costs per annum likely to be incurred by the United States should the Senate consent to the ratification of the proposed Treaty with Russia regarding Intermediate-range Nuclear Forces.

In my original letter I asked that the work be expedited in view of ongoing Senate consideration of the proposed Treaty and suggested a January 25, 1988 deadline. Without obtaining some cost estimates from the General Accounting Office, it will be difficult for the Committee on Foreign Relations to report accurately to the Senate on all aspects of the Treaty.

Accordingly, I request that you personally review the actions of your agency on this subject with a view to expediting the preparation of this badly needed data.

Sincerely,

Jesse Helms

JESSE HELMS
cc:The Honorable Claiborne Pell

Item C

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN
JOSEPH R. BIDEN, JR., DELAWARE
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JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

February 22, 1988

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Comptroller General:

As you may know, press accounts have estimated the added cost of verification of compliance with the proposed Intermediate-range Nuclear Forces Treaty at about $200 million per annum.

I understand that the Department of Defense will not seek a separate appropriation for, nor in its budget submission will it separately budget for, these additional costs.

Accordingly, I request that you conduct an investigation to determine how these costs are to be paid. I specifically ask that you determine whether existing plans for meeting these expenses would, if carried out, violate existing statutes or be a felony under the Anti-Deficiency Act in that funds would be diverted for a purpose not intended by Congress when appropriated.

Sincerely,

Jesse Helms

JESSE HELMS
cc:The Honorable Claiborne Pell

Item D

0271

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN

JOSEPH R. BIDEN, JR., DELAWARE
PAUL S. SARBANES, MARYLAND
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GERYLD B. CHRISTIANSON, STAFF DIRECTOR
JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

February 22, 1988

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Comptroller General:

I have recently received unconfirmed reports that the General Counsel or some other official at the Arms Control and Disarmament Agency on or about February 17, 1988, ordered the destruction by shredding of a large number of internal ACDA documents and records, some or all of which may have had relevance to ongoing GAO and FBI investigations of ACDA.

If these reports are correct, then there may be a basis for believing that a crime or crimes may have been committed by the personnel involved.

Accordingly, and before referring the matter to the Attorney General, I urgently request that you provide to me at the earliest possible date a report on the accuracy of the allegations and the nature and quantity of the documents destroyed, if any. Although it can be expected to be asserted that the documents were shredded as normal administrative practice, I ask you to look beyond that assertion to determine if there is a reason to suspect wrongdoing and a cover-up.

Sincerely,

Jesse Helms

JESSE HELMS
cc:The Honorable Claiborne Pell

Item #4E

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, DC 20515

March 10, 1988

Honorable Claiborne Pell
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

At the request of your staff, the Congressional Budget Office has prepared a cost estimate for Treaty Document 100-11, the Treaty between the United States of America and the Union of Soviet Socialist Republics on the elimination of their intermediate-range and shorter-range missiles.

CBO estimates that in the long run the treaty would reduce defense costs because the costs of weapons destruction and treaty monitoring are less than the savings from operating the weapons being destroyed. Defense funding is provided in annual appropriations bills that are indirectly affected by the treaty; consequently, CBO measures costs and savings relative to the funding levels of its current policy baseline. Net savings could eventually be as high as $1 billion per year although there may be a transition period during which the treaty costs slightly more than it saves. All estimates are subject to important assumptions that are highly uncertain--particularly with respect to those governed by Administration funding requests and the subsequent appropriations bills.

Uncertainty affects the estimates for both the costs and the savings associated with the treaty. CBO has no independent estimate of implementation costs of the treaty such as those for destruction of missiles, elimination of missile launchers and facilities, inspections, and testing and escort teams involved in verification of treaty compliance. CBO assumes the Defense Department's estimates for 1988 and 1989—about $200 million and $150 million, respectively--are indicative of the long run annual costs although long run costs could be lower since some of the initial spending will be on weapons destruction and other one-time costs. It is further assumed that there would be no additional conventional or other force requirements as a result of this reduction in nuclear capability.

Savings totaling as much as $1.1 billion would accrue each year from lower force levels including fewer military and civilian personnel and other lower operating costs. CBO assumes that personnel and other resources for the systems to be destroyed would not be used for other activities and that

Honorable Claiborne Pell
March 10, 1988
Page 2

military personnel levels could be reduced by about 22,000 people. Of this amount 12,000 are directly associated with the weapons to be destroyed, and 10,000 are indirect or support personnel. In addition, civilian strengths are assumed to decline by about 3,000 people because of the assumed reductions in the support establishment.

Sincerely,

James Blum

James L. Blum
Acting Director

cc: Honorable Jesse Helms
Ranking Minority Member

Item F

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN
JOSEPH R. BIDEN, JR., DELAWARE
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JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

March 11, 1988

Mr. James L. Blum
Acting Director
Congressional Budget Office
House Annex 2
Washington, D.C. 20515

Dear Mr. Blum:

I received today your letter of March 10, 1988, which purports to be a cost analysis of the proposed Treaty between the United States of America and the Union of Soviet Socialist Republics concerning Intermediate-range Nuclear Weapons.

Frankly, I am worried that neither the depth of the analysis nor the realism of the assumptions does sufficient justice to a subject of such grave import for the security of Western Europe and, indeed, of the United States itself.

Inasmuch as your letter is no doubt destined to be extensively cited by Treaty proponents as justification for ignoring the in-depth audit of Treaty costs being prepared by the General Accounting Office, I would very much appreciate it if you would provide to me the back-up documentation, if any, for the comments made in your brief report.

I also request that you prepare a cost estimate which assumes no reductions in military or civilian force levels and a further estimate that assumes no personnel reductions plus the formation and fielding during FY90 of one additional United States armored division based in Europe.

Additionally, I ask that you prepare a comprehensive cost estimate based on the assumptions stated in the memorandum I prepared in early January for the Republican Members of the Committee on Foreign Relations. I am enclosing for your reference a copy of the relevant part of the memorandum.

Since a clear understanding of the cost of the proposed Treaty is essential to informed Committee and Senate consideration of it, I ask that the foregoing matters be handled expiditiously and certainly before any Committee action on the proposed Treaty.

Sincerely,

Jesse

JESSE HELMS
cc:The Honorable Claiborne Pell
cc:The Honorable Robert Byrd
cc:The Honorable Robert Dole
Enc:1

Issue 9

Cost to United States: *What is the cost to the U.S. taxpayer in terms of weapons destroyed, implementation of Treaty actions, and redressing the conventional military balance in Europe?*

At present, cost data on the implementation of the proposed treaty on intermediate-range nuclear forces has not been provided to the Committee. However, it appears that there will be substantial taxpayer expense resulting from the proposed destruction of 689 intermediate-range missiles and 170 shorter-range missiles of other types together with the reprocessing of approximately 859 nuclear warheads now on those missiles.

These costs will include the following:

- the actual costs of missile destruction and warhead reprocessing.
- the costs of verification.
- the lost investment in research, development, test, and evaluation (RDT&E), procurement, personnel and personnel training, and military construction associated with each system to be eliminated.
- the costs associated with lost employment and lost taxes.
- the sunk costs in civilian-owned plant and equipment which will no longer be utilized.

Obviously against these costs should be offset various savings including, for example, the savings in operation and maintenance expenses which will eventually accrue should these systems cease to be operated and maintained.

These savings, however, are likely to be minuscule if compared to the expense of raising conventional or chemical force levels to compensate for the conventional imbalance in NATO which will be exposed by the removal of the Pershing II nuclear shield.

Estimating the cost of redressing the conventional imbalance will be difficult, but it can be done through standard methods such as estimating current dollar cost of a so-called "division slice." A division slice is usually defined as the total expense associated with fielding a manuever division, that is the cost of the division itself plus the cost of its support at corps, theater, and higher levels.

To rationalize the estimating process, it should be based on the assumption that parity is achieved when there is equality in manuever divisions of various types between the following two force levels: 1) all NATO and U.S. divisions wherever based, and 2) all Warsaw Pact and Soviet divisions wherever based. The estimate should also include reserve divisions of both sides and assume full mobilization of both sides to obviate questions of division readiness categories in the case of the Soviet Union and Warsaw Pact and the various similar issues of division readiness in NATO and the United States.

Although this conventional upgrade cost estimate will be necessarily and admittedly abstract, it could nevertheless prove extremely useful to the Committee in developing a general concept of the potential long-term effect of the proposed treaty on the federal budget.

Item A4G

[illegible]

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

March 11, 1988

The Honorable Charles Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Comptroller General:

I am enclosing a copy of a letter I received today from the acting director of the Congressional Budget Office. The letter purports to provide a cost analysis of the proposed Treaty between the United States of America and the Union of Soviet Socialist Republics concerning Intermediate-range Nuclear Forces.

Frankly, I found the analysis lacking in depth and the assumptions on which it is based to be wholly lacking in realism. Nonetheless, it is, I suppose, some contribution toward our effort to arrive at useful conclusions concerning the likely cost of the proposed Treaty.

In that regard, I particularly appreciate the ongoing work of the General Accounting Office in this area, and I understand that, notwithstanding the view expressed in my recent letter to you on the subject, a great deal of progress has, in fact, been made. Nevertheless, I must emphasize that it would be a pity and a disservice to the public if the only cost data before the Committee on Foreign Relations at any mark-up of the proposed Treaty were to be the thin gruel served up by the Congressional Budget Office.

Accordingly, I again stress the importance of proceeding expeditiously with your own work in this area without, of course, sacrificing the high standards of professionalism observed in your agency.

It would, I believe, also be of assistance to the Committee if the GAO would review the data and analysis used by the Congressional Budget Office to determine if that data and analysis could be of value to the GAO in its own work.

Obviously, I would additionally value any comments or observations on the CBO estimate that might be forthcoming from your agency.

Please express my appreciation to your staff for the hard work they have already contributed to this project.

Sincerely,

Jesse Helms

JESSE HELMS
cc:The Honorable Sam Nunn
cc:The Honorable John Warner

BY MESSENGER

Item H

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN
JOSEPH R. BIDEN, JR., DELAWARE
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JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

March 11, 1988

The Honorable Sam Nunn
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Sam:

I am enclosing a copy of a letter that Chairman Pell and I received from the acting director of the Congressional Budget Office. The letter purports to provide a cost analysis of the proposed Treaty between the United States of America and the Union of Soviet Socialist Republics concerning Intermediate-range Nuclear Weapons.

I am confident that you will agree with me that the information supplied by CBO is potentially misleading in that it is based on assumptions that would almost certainly prove unrealistic should the Treaty be approved.

As you may know, I asked the General Accounting Office to conduct an in-depth audit of potential costs and savings of the Treaty. That audit has been underway for some time now, but I expect useful results in the near future.

In the interim, I would particularly appreciate your view of the assumption made by CBO that ratification of the proposed Treaty will result in a 22,000 man reduction in military personnel and a 3,000 man reduction in Department of Defense civilians. My own view is that the CBO's assumptions are entirely unrealistic and that, if anything, the proposed Treaty, if ratified, could make necessary substantial increases in conventional forces, whether in personnel or equipment or both.

Sam, an assessment of these matters by you and John Warner could be vital to a proper understanding in the Committee on Foreign Relations of the potential budget impact of the Treaty and would, at the very least, be greatly appreciated by me.

With warm personal regards, I am

Sincerely,

Jesse

JESSE HELMS
cc:The Honorable John Warner
Enc:1

United States General Accounting Office

GAO

Fact Sheet for the Ranking Minority Member, Committee on Foreign Relations, U.S. Senate

Item [illegible] I

March 1988

INF TREATY

Cost of Weapon Systems To Be Destroyed and Possible Savings

GAO/NSIAD-88-141FS

GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-230521

March 24, 1988

The Honorable Jesse Helms
Ranking Minority Member
Committee on Foreign Relations
United States Senate

Dear Senator Helms:

In January 1988 you requested that we provide a detailed cost analysis of the fiscal impact of the proposed Intermediate-Range Nuclear Forces (INF) Treaty. Subsequently, we agreed to identify--to the extent possible--the costs of implementing the treaty; the total program costs associated with the missile systems to be destroyed; and estimated savings, if any, which may be attributable to the accord.

If ratified, the treaty would require that the United States destroy a total of 867 missiles--178 Pershing IAs, 247 Pershing IIs, and 442 Ground Launched Cruise Missiles (GLCM), their launchers, and specified support facilities, and training equipment. Information on the costs of implementing the treaty is classified and will be provided separately. This fact sheet provides information on the missiles' program costs and preliminary estimates on costs that may be avoided as a result of the treaty.

The total program costs through fiscal year 1987 for the Pershing II and GLCM missile systems are $2.60 billion and $3.45 billion, respectively (see app. I). (Program costs of the Pershing IAs to be destroyed were not available.) Some of the equipment not subject to the treaty will be redistributed to other programs. Other funds will be recovered. To date, for example, the Air Force has identified over $550 million in equipment that will be reused and about $50 million in funding that will be recovered due to project cancellations. Army officials stated that various Pershing support equipment will be reused; however, they had not yet quantified the value of these items.

The Department of Defense has estimated that, as a result of the treaty, costs of $219 million in fiscal year 1988 and $240 million in fiscal year 1989 could be avoided for the Pershing II and GLCM programs. Further, the Army estimates that $1,223 million in costs for the Pershing program through fiscal year 1995 could be avoided. (See app. II.) The Air Force has not provided a similar estimate for the GLCM program.

Unless you publicly announce its contents earlier, we plan no further distribution of this fact sheet until 5 days from its date. At that time, we will send copies to appropriate congressional committees and copies will be made available to other interested parties on request.

If we can be of further assistance, please call me on 275-4128.

Sincerely yours,

Joseph E. Kelley

Joseph E. Kelley
Associate Director

HISTORICAL PROGRAM COSTS FOR THE PERSHING II AND GROUND LAUNCHED CRUISE MISSILE

The Intermediate-Range Nuclear Forces (INF) Treaty requires that the United States destroy all of its Pershing IIs and Ground Launched Cruise Missiles (GLCM), their launchers, and specified support equipment and facilities.[1] According to Selected Acquisition Report data, the total approved program cost of the Pershing II and GLCM systems (through fiscal year 1987) is $2.60 billion and $3.45 billion, respectively. As shown in table I.1, this includes research, development, test and evaluation (RDT&E); procurement; military construction; and missile modification costs.

Table I.1: Total Approved Program Costs Through Fiscal Year 1987.

Cost category	PERSHING II[a]	GLCM[b]
	------(millions)------	
RDT&E	$ 692.4	$ 383.7
Procurement	1,763.4	2,720.7
Military Construction	3.8	324.8
Modifications[c]	137.0	22.8
Total	$2,596.6	$3,452.0

[a] Pershing II figures are based on the September 30, 1987, Selected Acquisition Report.
[b] GLCM figures are based on the December 31, 1986, Selected Acquisition Report, as updated through fiscal year 1987.
[c] Total costs for modifications to in-service missiles are not reported in Selected Acquisition Reports. These amounts were provided separately.

Army officials told us that some of the equipment procured under the Pershing II program would not be subject to treaty limitation and would therefore be available for use in other Army units. Such items include radios, trucks, generators, tool kits, and other support equipment. However, Army officials had not yet quantified the value of this equipment.

Air Force officials also told us that some GLCM equipment would not be eliminated under the treaty and could therefore be reused by other units. For example, 76 Launch Control Centers, valued at approximately $6 million each, will be reconfigured and reused by the Air Force. In addition, $114 million worth of missile components and subassemblies produced under existing Air Force contracts will be made available to the Navy. These items will be used in the Navy's Sea-Launched Cruise Missile program.

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[1] The treaty also requires that the United States destroy all of its shorter-range Pershing IA missiles. However, historical program cost information for these missiles was not available when this report was prepared.

The Air Force also expects to recover approximately $40 million to $58 million in previously approved military construction funding due to project cancellations.

ESTIMATES OF COST AVOIDANCE UNDER THE INF TREATY

The Department of Defense (DOD) and the Army have made certain limited estimates of possible costs that will be avoided with ratification and implementation of the INF treaty. Both estimates assumed that the treaty would be ratified as of April 1, 1988. The DOD estimate is for fiscal years 1988 and 1989 and totals $459 million, as illustrated in the following table.

Table II.1: Pershing and GLCM Costs That Can be Avoided.

Cost category	Fiscal year 1988	Fiscal year 1989
	-----(millions)	----
Pershing		
Operations and Maintenance	$ 7	$ 19
Military Personnel	-	77
Procurement	-	15
Total	$ 7	$111
GLCM		
Operations and Maintenance	$ 29	$ 43
Military Personnel	-	55
Procurement	101	30
Military Construction/ Military Family Housing	77	-
RDT&E	5	1
Total	$212	$129
TOTAL	$219	$240

According to DOD officials, these cost reductions are reflected in DOD's amended budget request for fiscal years 1988 and 1989. Also, the personnel savings reflected above will be applied to other requirements and will not result in actual personnel reductions. No offsets for missile destruction or compliance inspections are reflected here.

The U.S. Army Missile Command estimated possible costs that will be avoided through fiscal year 1995. The Army, for planning purposes, has listed the Pershing as a 21-year program, 1975-1995. Therefore, without the treaty, costs would be incurred for this program through 1995. The missile command's estimate of total cost avoidance is $1,222.9 million for 7-1/2 years (an average of $163 million per year), as shown in the following table. This estimate does not include costs incurred by other offices.

Table II.2: Pershing II costs that can be avoided, April 1, 1988-Sept. 30, 1995.

Cost category	Cost (millions)
RDT&E	$ 62.5
Procurement	241.9
Military Construction	-
Operations and Maintenance	918.5
Total	$1,222.9

The entire Pershing system must be eliminated within 36 months subsequent to treaty ratification. Figures are based on the initial approved withdrawal schedule available in December 1987. Changes to this schedule will have an impact on estimated avoided costs.

Item 10 2J

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

March 28, 1988

Honorable Jesse Helms
Ranking Minority Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Senator:

This letter is in response to your request of March 11, 1988 in which you asked for back-up documentation of our cost estimate for the proposed treaty on intermediate range nuclear forces. You also asked that we prepare an estimate assuming no manpower reductions, an estimate of the cost of fielding an armored division in Europe, and an estimate based on assumptions you stated in a memorandum for Republican members of the Committee on Foreign Relations.

As we stated in our letter of March 10, 1988, CBO estimates that the treaty would reduce long run defense costs by about $1 billion per year because the costs of destroying weapons and treaty monitoring would be less than the savings from operating the weapons being destroyed. But, the treaty itself neither costs nor saves money because defense funding is the subject of annual budget requests and appropriations bills.

The CBO cost estimate attempts to show the cost implications of the treaty without anticipating other decisions by the Administration on what amounts to request for defense and by the Congress on what amounts to provide. Consequently, the estimate assumes reductions occur in funding for both personnel levels and other costs in all relevant categories of the budget--direct force operations and support, and indirect support. Table 1 shows the back-up documentation for our estimate of savings. As we said in our earlier letter, we have no independent estimate of the costs of weapons destruction and treaty monitoring--we assume that long run costs are about the same as the Defense Department has estimated for 1989.

The next three tables have been prepared according to the specifications in your letter. Table 2 shows the cost reductions assuming no personnel reductions occur. Table 3 shows the annual recurring costs of an armored division and a mechanized division based in Europe. The non-recurring costs--costs to procure an initial set of weaponry--total about $5 billion each for the armored and the mechanized divisions. Table 4 shows the acquisition costs for Pershing II and Ground-Launched Cruise Missiles; these are sunk costs and as such should not be viewed as additional costs of the treaty. CBO is not able to prepare an estimate of any impact the treaty may have, if any, on employment, federal revenue, and the sunk costs of civilian-owned plant and equipment.

Honorable Jesse Helms
March 28, 1988
Page 2

Finally, CBO is unable to estimate the cost of raising conventional forces to the levels postulated in your letter. Equality in maneuver divisions is practically impossible to determine because of different personnel levels, stock and quality of weapons, and other intangible factors like troop morale, training, and whether units are on the offensive or defensive.

Sincerely,

James Blum

James L. Blum
Acting Director

cc: Honorable Claiborne Pell
Chairman

Honorable Robert C. Byrd
Majority Leader

Honorable Robert Dole
Republican Leader

TABLE 1. ESTIMATED SAVINGS FROM RETIRING PERSHING II AND GROUND LAUNCHED CRUISE MISSILES-ASSUMING ENDSTRENGTH CHANGES (In millions of 1989 dollars and numbers of people by end of fiscal year)

Category	Pershing II	GLCM	Total
	Dollars		
Direct:			
Military Personnel	155	100	255
Operation and Maintenance	60	110	170
Procurement	25	30	55
Total	240	240	480
Indirect:			
Military Personnel	240	80	320
Operation and Maintenance	100	70	170
Procurement	30	50	80
Military Construction	a/	a/	10
Family Housing	a/	a/	a/
Total	380	200	580
Total:			
Military Personnel	395	180	575
Operation and Maintenance	160	180	340
Procurement	55	80	135
Military Construction	a/	a/	10
Family Housing	a/	a/	a/
Total	620	440	1,060
	Manpower		
Direct:			
Military	6,800	3,200	10,000
Civilians	0	b/	b/
Total	6,800	3,200	10,000
Indirect:			
Military	6,900	2,500	9,400
Civilians	2,100	800	2,900
Total	9,000	3,300	12,300
Total:			
Military	13,700	5,700	19,400
Civilians	2,100	800	2,900
Total	15,800	6,500	22,300

SOURCE: Compiled by Congressional Budget Office based on data provided by the Department of Defense.

NOTE: Numbers may not add to totals because of rounding.

a. Less than $10 million.
b. Less than 50 people.

TABLE 2. ESTIMATED SAVINGS FROM RETIRING PERSHING II AND GROUND LAUNCHED CRUISE MISSILES-ASSUMING NO ENDSTRENGTH CHANGES (In millions of 1989 dollars)

Category	Pershing II	GLCM	Total
Direct:			
Military Personnel	0	0	0
Operation and Maintenance	60	105	165
Procurement	25	35	60
Total	85	140	225
Indirect:			
Military Personnel	0	0	0
Operation and Maintenance	30	35	65
Procurement	30	40	70
Military Construction	a/	a/	a/
Family Housing	a/	a/	a/
Total	60	80	140
Total:			
Military Personnel	0	0	0
Operation and Maintenance	90	140	230
Procurement	55	75	130
Military Construction	a/	a/	a/
Family Housing	a/	a/	a/
Total	145	220	365

SOURCE: Compiled by Congressional Budget Office based on data provided by the Department of Defense.

NOTE: Numbers may not add to totals because of rounding.

a. Less than $10 million.

TABLE 3. ESTIMATED RECURRING COSTS OF ADDITIONAL DIVISIONS IN EUROPE (In millions of 1989 dollars and numbers of people by end of fiscal year)

Category	Armored Division	Mechanized Division
	Dollars	
Direct:		
Military Personnel	560	545
Operation and Maintenance	170	170
Procurement	700	315
Total	1,430	1,030
Indirect:		
Military Personnel	600	590
Operation and Maintenance	410	380
Procurement	130	130
Military Construction	20	10
Family Housing	a/	a/
Total	1,160	1,110
Total:		
Military Personnel	1,160	1,135
Operation and Maintenance	580	550
Procurement	830	445
Military Construction	20	10
Family Housing	a/	a/
Total	2,590	2,140
	Manpower	
Direct:		
Military	19,600	19,100
Civilians	0	0
Total Manpower	19,600	19,100
Indirect:		
Military	21,700	21,100
Civilians	7,600	7,000
Total Manpower	29,300	28,100
Total:		
Military	41,200	40,200
Civilians	7,600	7,000
Total Manpower	48,800	47,200

SOURCE: Compiled by Congressional Budget Office based on data provided by the Department of Defense.

NOTE: Numbers may not add to totals because of rounding.

a. Less than $10 million.

TABLE 4. ACQUISITION COSTS FOR PERSHING II AND GROUND LAUNCHED CRUISE MISSILES (1975-1988) (in millions of dollars)

Appropriations	Current Dollars	1989 Dollars
Pershing II Missile:		
RDT&E 1/	690	970
Procurement	1,770	2,100
Military Construction	40	40
Totals	2,500	3,110
Ground Launched Cruise Missile:		
RDT&E 1/	380	520
Procurement	2,720	3,250
Military Construction	320	380
Totals	3,420	4,150
Total:		
RDT&E 1/	1,070	1,490
Procurement	4,490	5,350
Military Construction	360	420
Totals	5,920	7,260

SOURCE: Compiled by Congressional Budget Office based on data supplied by the Department of Defense.

NOTE: Numbers may not add to totals because of rounding.

a. Research, development, test and evaluation.

Item K

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN
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United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

March 28, 1988

Mr. James L. Blum
Acting Director
Congressional Budget Office
House Annex 2
Washington, D.C. 20515

Dear Mr. Blum:

I have received your letter of today in which you respond to my request for additional information on the cost to taxpayers of the proposed Treaty with the Soviet Union concerning Intermediate-range Nuclear Forces. Your prompt work and correspondence on that subject are very much valued; however, I would appreciate as well the following additional data.

1) The net total cost of the proposed Treaty, if ratified, during the thirteen fiscal years starting with FY1989 assuming a) no end-strength reductions in DOD personnel, b) no increases in conventional or other forces to offset the loss of systems to be eliminated, c) a loss of the acquisition cost of the systems to be eliminated less cost avoidance of system components useable in other programs, and d) treaty obligation implementation costs of $200 million per year.

2) The net total cost of the proposed Treaty, if ratified, during the thirteen fiscal years starting with FY1989 with all of the assumed cost factors stated in 1) above plus the cost of fielding and maintaining one additional armored division in Europe for a period of thirteen years also beginning in FY1989.

3) The net cost of the proposed Treaty, if ratified, during the thirteen fiscal years starting with FY1989 with all of the assumed cost factors stated in 1) above plus the cost of fielding and maintaining one additional mechanized division in Europe for a period of thirteen years beginning in FY1989.

4) The net total cost of the proposed Treaty, if ratified, during the thirteen fiscal years starting with FY1989 with all of the cost factors stated in 1) above plus a rough estimate of contract termination costs for contracts involving systems

to be eliminated and lost sunk costs in private plant and equipment as well as lost federal taxes resulting from lost individual and corporate income.

To assist in the foregoing, I am enclosing a copy of the recent General Accounting Office interim study which contains data which might be useful to CBO especially with regard to the cost avoidance factor.

I recognize that the last net cost estimate requested is substantially more difficult than the first three requested net estimates. Accordingly, I ask that the first three net estimates be provided without waiting for the analysis necessary to make the estimate requested in item 4).

If available, please also provide in a classified annex (POC: David Sullivan, PSM, Senate Committee on Foreign Relations) an estimate of the cost of NTM verification systems attributable to verification of the proposed Treaty during the five-year period FY89-FY94 and during the ten-year period FY89-FY99.

Although I understand that you will be unable to provide any of this information before final Committee action on the proposed Treaty, your prompt attention to this request is nonetheless solicited so that some or all of the unclassified material is available, if possible, for inclusion in the Committee report and all of it, in any event, is at hand before any Senate consideration of the proposed Treaty in Executive Session.

With appreciation for your past help, I am

Sincerely,

Jesse Helms

JESSE HELMS
cc:The Honorable Claiborne Pell
cc:The Honorable Robert Byrd
cc:The Honorable Robert Dole

By hand

Item [illegible] L

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

April 12, 1988

Honorable Jesse Helms
Ranking Minority Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Senator:

This letter is in response to your request of March 28, 1988 that the Congressional Budget Office prepare cost estimates of options specified in your letter.

The attached table contains most of the data you requested. All options represent net cumulative costs or savings for thirteen years, 1989-2001. Option 1 specified that Pershing Missile and Ground Launched Cruise Missile units would be eliminated, personnel levels would not change, no other forces are added, and that the costs of implementing the treaty are about $200 million per year. Option 1 saves about $2 billion net for the thirteen years. Option 2 includes all your assumptions from option 1 plus the cost of fielding an additional armored division and costs about $35 billion over thirteen years. Option 3 is the same as option 1 except that a mechanized division is added and costs about $29 billion over thirteen years.

You specified a fourth option that included all the assumptions of option 1 plus the costs of contract termination, sunk costs of private plant and equipment, and lower federal revenues. We do not know what the termination costs may be, but we understand from the Department of Defense that funds appropriated to date are enough to cover any likely costs of this type. Also, we do not have an estimate for any potential changes in federal revenue because it is impossible to estimate such costs. For example, we do not know how individual and corporate income will be affected; a loss of income from one source can be offset by a rise in income from another source.

In our letter of March 28, 1988, we reported that the acquisition costs of the relevant weapons totaled about $5.9 billion--these sunk costs are not included in any of these estimates because they--like the sunk costs of private capital--are not additional costs of the proposed treaty.

Also, although the General Accounting Office found $550 million in equipment that can be reused and about $50 million in funding that can be reprogrammed, our estimates assume a savings totaling only about $160 million. We use a lower amount because the Department of Defense has indicated that while it will attempt to use equipment originally valued at the higher amount that use eliminates the need for planned purchases totaling only about $160 million.

Finally, we will not be able to provide the classified information on NTM systems attributable to the proposed treaty because no one at CBO possesses the requisite security clearances for that type of information. Perhaps the Intelligence Community Staff can supply you with what you want either directly or through the Senate Select Committee on Intelligence.

Sincerely,

for

James L. Blum
Acting Director

Attachment

cc: Honorable Claiborne Pell
Chairman

Honorable Robert C. Byrd
Majority Leader

Honorable Robert Dole
Republican Leader

Attachment

ESTIMATED SAVINGS (-) AND COSTS (+) FOR OPTIONS SPECIFIED BY SENATOR HELMS (In millions of 1989 dollars, cumulated over 13 years)

Category	Option 1	Option 2	Option 3
Direct:			
Military personnel	0	6,990	6,830
Operation and maintenance	50	2,180	2,130
Procurement	-770	13,020	8,070
Military construction	-40	-40	-40
Total	-760	22,150	16,990
Indirect:			
Military personnel	0	7,530	7,320
Operation and maintenance	-700	4,430	4,040
Procurement	-790	860	780
Military construction	-80	120	110
Family housing	-10	30	20
Total	-1,580	12,970	12,270
Total:			
Military personnel	0	14,520	14,150
Operation and maintenance	-650	6,610	6,170
Procurement	-1,560	13,880	8,850
Military construction	-120	80	70
Family housing	-10	30	20
Total	-2,340	35,120	29,260

SOURCE: Compiled by Congressional Budget Office based on data provided by the Department of Defense.

NOTE: Numbers may not add to totals because of rounding.

Iten [illegible]

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United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

April 12, 1988

Mr. James L. Blum
Acting Director
Congressional Budget Office
House Annex 2
Washington, D.C. 20515

Dear Mr. Blum:

Thank you very much for your letter of today in which you provide additional cost data with respect to the proposed INF Treaty.

We apparently have a different perspective on the fiscal aspects of the destruction of approximately $7 billion worth (in current dollars) of taxpayer property. Frankly, it seems to me, and I feel reasonably sure that most taxpayers would agree, that this factor can validly be considered a Treaty cost. Likewise, I do not understand your acquiescence in the rather superficial position of the Department of Defense that contract termination costs are irrelevant since the money to pay these expenses has already been appropriated.

I make no claim to be an accountant, but I think it approaches being deceptive for the Department to pretend that simply because money has already been appropriated there is no Treaty associated expense to taxpayers. Basic arithmetic would dictate otherwise since money spent on contract termination cannot be spent either for the purpose for which it was originally appropriated or for some other useful purpose under the Defense Budget Function 050.

But I do not suppose that I am going to be able to convince you of the foregoing, although I hope I shall have better success with the public.

Nonetheless, I do very much value the work given to this project by the Congressional Budget Office and have at this point only one final request.

If appropriate, please review your estimates on the cost of an additional armored division and an additional mechanized division. Although I may have missed the point, it appears to me you have not included the approximately $3.7

billion (in current dollars) that the Army Comptroller advises would be required to purchase the initial equipment for a type heavy division and instead have simply multiplied the annual sustainment costs by the specified thirteen year period in which the Treaty is to be actively implemented.

With very best regards, I am

Sincerely,

Jesse Helms

JESSE HELMS

By Hand

Item N

CLAIBORNE PELL, RHODE ISLAND, CHAIRMAN

JOSEPH R. BIDEN, JR., DELAWARE
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JAMES P. LUCIER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

April 12, 1988

The Honorable David Boren
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear David:

I am enclosing a copy of a letter I received today from the Congressional Budget Office concerning potential costs to taxpayers should the proposed INF Treaty be approved by the Senate and thereafter ratified.

I call your attention particularly to the last paragraph of the letter in which the Acting Director of the Congressional Budget Office explains that the CBO is unable to make a cost estimate of NTM verification upgrades because no one at the CBO has the necessary security clearances for that information.

The CBO Acting Director suggests that the estimates be obtained directly from the Select Committee on Intelligence. Accordingly, and although I regret having to burden you with this request, I would deeply value an estimate of these costs computed over a 13 year period beginning with FY89 which is roughly the period in which the Treaty would be actively implemented.

Obviously I recognize that the estimates will be highly classified, and it would be my intent to use the data only in the TOP SECRET/SCI Annex to the report of the Committee on Foreign Relations. This Annex will be maintained only in the secure facility in the Capitol.

Unfortunately, the deadline for filing our Committee report has been set for 5:00 P.M. Thursday, April 14. I know this gives you very little notice, but I do consider the estimate to be of considerable importance and only discovered today that the CBO cannot handle the matter.

The requested material could be transmitted to Mr. David Sullivan who is cleared for the required compartments, and I have taken the liberty of asking him to coordinate directly with your staff in that connection.

With warm personal regards, I am

Sincerely,

Jesse

JESSE HELMS
Enc: (as)

BY HAND

IX. EUROPE AS A STRATEGIC THREAT TO THE SOVIET UNION

A. INF WEAPONS AS A STRATEGIC DEPLOYMENT

The U.S. view of strategy is conditioned by the "island mentality" of North America, in which the enemy has always been far off, across the seas. Our concept of a strategic weapon—one that delivers a fatal blow—has always been limited to intercontinental weapons.

The Soviet view of the INF Treaty is undoubtedly quite different from ours, conditioned as it is by the Soviet Union being part of the Eurasian land mass. For the Soviets, the proximate strategic threat has always been a hospital Europe. For the Soviets, a fatal stroke can come from Europe, as well as the United States. The weapons which are deployed to counter the strategic threat from Europe are strategic weapons of primary importance, despite the fact that we call them "intermediate range," as though they were only secondary.

The ulitmate goal of arms control is to achieve peace. But if the outcome of a specific arms control treaty is that war will be more likely, then that goal will have been betrayed. The likely outcome of the INF Treaty is that NATO will no longer have the military capability or the political determination to resist Soviet domination of the economic and social structure of Western Europe. The fundamental question is whether the common personal, social, and religious freedoms that are part of Western culture will disappear in Western Europe, as they have in Eastern Europe, or whether there will be war.

The State Department established narrow and technical instructions for the INF negotiators without examining the underlying premise that the removal of "an entire class" of weapons would be a step toward peace. The negotiators failed in their purpose of achieving the verifiable removal of all Soviet Weapons in the supposed "class." But their failure is even more profound: As the hearing record shows, they failed to examine Soviet military doctrine in order to understand the strategic role played by the missiles in the so-called class to be eliminated.

The crucial issue is not just whether a given text of the INF Treaty is deficient or not. The issue is whether any INF Treaty, even a perfect one, can preserve the peace in Europe without being part and parcel of an agreement leading to the elimination of all nuclear and conventional weapons imbalances. The Pershing II ballistic missiles and the ground-launched cruise missiles that NATO has deployed are an integral part of our deterrence system that cannot be divorced from U.S. intercontinental-range missiles. Ratification of any agreement on intermediate-range missiles in the absence of a comprehensive agreement is an error as significant as ordering the submarine to descend without closing the hatch.

The distinction between intermediate- or theater-range missiles and intercontinental or strategic range missiles is one that does not exist in Soviet thinking. The distinction is an error that is easy for Americans to make. The United States has never suffered the destruction and devastation of its own territory at the hands of a foreign enemy. We are concerned with the nuclear threat which might be launched from the Soviet continent, a threat which could result in death and defeat. Weapons of lesser range seem to us to be of less importance; we are threatened only with the overarching "stratgeic" threat.

The Soviet perspective is completely different.

The Napoleonic campaign against Moscow of the 19th century was a failure because the military technology of that day was no match for the Russian winter. Nevertheless, Czar Alexander was leading Russian troops into Paris by the spring of 1814. Therefore, the prospect of a land invasion has always left an indelible impression on the Russian mind.

The new Soviet regime of 1920 had not yet consolidated its power in all the republics when it began to build alliances to protect against European invasion. In 1922, the Treaty of Rapallo resulted in the Soviet Union and Germany combining to defeat the arms control measures of that day with the establishment of German arms development laboratories and factories in the Soviet Union under the administration of German military officers. This clandestine cooperation was matched by a growing commercial trade between the two countries.

Thus the Hitler-Stalin pact of 1939 was not a sudden development, but the result of years of experience and cooperation to violate the arms control agreements of the time. The two systems, rooted in atheist ideology, had a lot in common, including designs on the territory of Poland. On the Communist side, the Soviets never violated this agreement. The impact of Hitler's betrayal of the Communists convinced the Soviet Union that Europe would always be a threat to the Soviet Union as long as Europe was not Communist.

The devastation of the Soviet Union from the German invasion threw Stalin in on the side of the allies. In the agreements of Yalta and Potsdam, Stalin made sure that he would be able to control the countries of East Europe after the war. When the short-lived free governments in those states were overthrown by internal subversion, Stalin's apologists in the United States defended his need for a "buffer zone" between the Soviet Union and freedom. It was left for Winston Churchill to declare that an Iron Curtain had descended across Europe.

The division of Germany into two parts, one slave and one free, was another expression of the Soviet anxiety that any free society was a threat to the closed society of communism. The Berlin agreement divided that capital into quadripartite areas of administration but allowed free access to all quarters. The sudden construction of the Berlin Wall to prevent the escape of East Germans to freedom was not permitted under that agreement, but was acquiesced in by the West. Although we maintained the freedom of West Berlin, the agreed-upon status of the Soviet sector was abandoned. This unchallenged violation of the Berlin agreement by the Soviets demonstrated that the political consequences of treaty violations were manageable.

Meanwhile, the Soviet preparations for an imagined threat coming from Europe increased. As the allied forces demobilized and the armies of occupation withdrew, the Soviets established the Warsaw Pact and increased their conventional forces. The first priority of the Soviet nuclear program was dedicated to European deployment, with the first deployment of SS-4's and later SS-5's aimed at European targets. indeed, the Soviet deployment of intermediate-range nuclear missiles in Europe was completed long before the Soviets were able to complete ICBM targeting against the United States. Clearly, the deployment of INF missiles in Europe was far more important to Soviet strategic planning than the ICBM's we commonly call "strategic."

The U.S. response to this INF deployment in Europe was the 1961 report by the NATO Policy Review Group, under the chairmanship of Paul Nitze, which recommended that the battlefield nuclear weapons then possessed by NATO forces be downgraded and removed. Under this program, the United States "Davy Crockett" tactical nuclear weapons were removed from Germany, forward-deployed nuclear systems such as artillery, rockets, and bombs were redeployed to the rear, dual-capable systems, such as air-defense missiles, were reconfigured to a conventional mode, and permissive action links (PAL), that is, locks, were installed on all deployed theater nuclear weapons.

Late in 1962, the United States learned that SS-4's and SS-5's had been installed in Cuba. We also learned that so-called intermediate-range missiles could indeed be strategic if they could reach your own bases and command and control centers. At this time the Soviets had begun to develop intercontinental-range ballistic missiles, but they did not yet have enough to challenge the United States directly. Therefore Khruschchev backed down, and the United States observed 42 missile-sized shapes shrouded with canvas on ships departing from Cuba. In the absence of positive evidence, the United States accepted the departure of the shrouded shapes. The Soviets first offered onsite inspection of the SS-4 sites in Cuba, but then reneged, claiming that Castro would not cooperate.

Subsequent to the removal of the 42 shrouded shapes, the United States removed its own Thor and Jupiter intermediate-range missiles from Italy and Turkey. But the removal of these early INF missiles did not result in Soviet disarmament.

The deployment of the SS-4's and SS-5's continued unabated in the Soviet Union, with some 1,200 installed by 1970 in the European territories and about 300 more in the Asian territories, according to standard unclassified sources. It should be understood that Soviet targets in Asia are not only in China, but include targets of military significance in Japan, Taiwan, and Korea. Since it is generally accepted that effective ballistic missile targeting requires at least two warheads to be exploded over a soft target at the same time, the size of this deployment suggests a target list of about 600 in Europe.

In 1977, the Soviets began to draw down the aging SS-4's and SS-5's, and deploy in their place a new, improved INF missile, the

SS–20. The SS–20 has three warheads, each warhead with an explosive power seven times as powerful as the Hiroshima bomb. To replace the 1,200 European SS–4's would therefore require a minimum of 400 SS–20's, assuming that every warhead was able to be fired and to reach its assigned target. The Asian deployment would require another 100 SS–20's, for a total of 500. A prudent military planner would assume a battlefield attrition rate of 50 percent, requiring SS–20 production run of at least 1,000 SS–20's. Such a number is close to newspaper accounts of conclusions reached by the majority of U.S. intelligence agencies.

From the Soviet point of view, therefore, the deployment of intermediate-range weapons is not a secondary, supplemental deployment. It is a strategic deployment, designed to fulfill a specific requirement of military doctrine, a requirement which will be discussed in detail at a later point. The decision of NATO to deploy the Pershing II's in 1979, therefore, come as a severe blow to Soviet strategy. The speed, penetration, and accuracy of the Pershing II's were perceived by the Soviet Union as making the Pershing II a strategic weapon more credible and more deadly than our deliberately inaccurate ICBM forces. Even though the planned Pershing II deployment would not be large enough to be perceived as a disarming first-strike threat, it is not surprising that the Soviets first moved to prevent the Pershing II deployment by orchestration and funding of the peace movement in Europe. Nor is it surprising when that failed that they then sought through diplomacy to have the Pershing II's removed.

For the Soviets, any strategic weapon that can reach the Soviet homeland has to be considered as a decisive weapon with a major outcome on any future war. They were ready to offer to trade elimination of the SS–20 for elimination of the Pershing II. But they stayed away from the bargaining table until they had a substitute ready for the missile they claimed to be giving up: The SS–25, an illegal "new-type" missile under the constraints of SALT II. Within weeks after the SS–25 began to be deployed, they returned to Geneva and were ready to talk. And they were not ready to sign the INF Treaty on December 9 until after the successful test in late October of the massive new SS–26 ICBM using Hawaii as the practice target.

With the intermediate-range weapons so important to Soviet strategy, we must examine very carefully whether we can be sure that the Soviets will actually eliminate the intermediate-range class as they claim, or whether they can fulfill the intermediate-range function through undetectable cheating, or through a consistent application of the Treaty provisions as they stand.

B. THE OGARKOV DOCTRINE: ITS IMPLICATIONS FOR INF

On October 30, 1987, Marshal of the Soviet Union Nikolay V. Ogarkov celebrated his 70th birthday. To commemorate the occasion, the President of the Soviet Union, Andrei A. Gromyko, conferred upon him the Order of the October Revolution "for his service in the Soviet Army."

At the present time, that service includes the position of Commander of the Western Theater of Military Operations, a position which he himself created in 1981 as Chief of Staff and First Deputy Defense Minister. The Commander of the Western Theater is responsible for all combined operations in Europe.

A Winnable War in a Nuclear Age

But Ogarkov created more than a job; he created a doctrine, a doctrine that formed the basis for the massive reorganization of Soviet military systems in 1981. The Ogarkov Doctrine was summarized in his book, "Always Ready To Defend the Fatherland" (1982).

The Ogarkov Doctrine called for the Soviet Union to go on a war footing, with massive mobilization of all military, economic, industrial, and civil defense resources to defeat the imperialist enemy. The concept of total military preparedness included revamping of the educational system to prepare future soldiers for the complexities of modern war machinery.

In short, the Ogarkov doctrine holds that war is winnable, even in a nuclear age. Moreover, Ogarkov constantly argued that Europe could be dominated without triggering a nuclear exchange between the Soviet Union and the United States.

The Strategy of Deception

Moreover, Ogarkov has been more than a theorist. As early as 1969, he was a key strategist involved in the SALT I and later the SALT II negotiations: He appeared prominently with General Secretary Brezhnev and President Carter in the 1979 summit. In 1969 he was also put in charge of the newly created Directorate of Strategic Deception [Maskirova], where he developed techniques of camouflage, concealment, encryption, and deception that were used effectively to circumvent the restraints of the strategic arms control treaties. In 1977, he became chief of staff. He was chief of staff when the SS–20 INF missiles were deployed against Europe.

His attitude toward the West is best exemplified by his unprecedented and brazen press conference defending the Soviet action in shooting down the KAL 007 airliner filled with innocent men, women, and children. What Ogarkov did not mention was that on the night of the shoot-down the Soviets were preparing a secret and illegal test believed to be an encrypted flight of the SS–25, a "new type" of ICBM prohibited under the SALT treaties.

Preparations for War

Before Ogarkov became chief of staff, the Soviet Union was divided into 20 small, inefficient "groups of forces" and military districts, each with its own commander. His first move, in 1981, was to create "theaters of military operations, or TVD's, through consolidation. Then in December 1983, he created three, overall theater commands above the TVD's. The most important of these theaters, the Western Theater, was organized to direct operations against Europe, placing all operation, including naval operations, under a single commander. Thus Europe would be confronted directly by the Soviet Union, instead of through the Warsaw Pact.

The significance of this action was, literally, to place the Soviet Union on a war footing, with the three theaters directly under the supreme high command. Had Soviet strategy been a nuclear one, relying upon the strategic rocket forces to defend against U.S. strategic deployments, such preparations and such theater forces would not have been necessary. Nor would theater preparations been necessary had the Soviets been expecting an invasion from NATO forces; but NATO has never had sufficient conventional forces to attack the Soviets, even if the NATO high command could have conceived of such an attack. The high degree of mobilization in the Ogarkov plan is necessary only if the Soviets had aggressive designs against NATO.

Ogarkov became chief of staff in 1977, the year that the SS-20's were first deployed. He was well aware that their purpose was political terror, rather than actual use. It was blackmail of a high order to hasten the denuclearization of Europe which had begun unilaterally in 1961.

However, the deployment of the SS-20's had the opposite effect, enkindling a furious debate. Finally NATO decided in 1979 to extend its range of options to include nuclear missiles capable of reaching military targets in the Soviet Union. Such a capability—that is to say, the INF—was insufficient to oppose invading Soviet forces, but it was enough to deter the Soviets from proposing such an invasion in the first place. The Pershing II is swift, sure, and powerful. The INF was to be deterrent in nature, not defensive.

Despite a massive program of Soviet-inspired and in part Soviet-financed political demonstrations in Europe, NATO members agreed to deployment of the Pershing II missile on their territories in 1981. When the United States proposed the double-zero option, eliminating both SS-20's and the Pershing II's, the Soviets rejected it out of hand. Nevertheless, the need remained to denuclearize Western Europe if the Ogarkov doctrine were to be successful.

Ogarkov spent 3 years in the planning and implementation of the doctrine. In 1984, he was given the chance to demonstrate in practical terms how the doctrine could be applied. He himself became the commander of the western district. Who else could best implement the doctrine?

As commander of the entire western district, Ogarkov is in direct charge of all theater forces, including the SS-20's—and perhaps even the variable-range SS-25's—in the Western Soviet Union, Poland, Czechoslovakia, and East Germany. As a former SALT negotiator, he is keenly aware of the role of the SS-20's in the Soviet panoply of intermediate-range and long-range nuclear weapons. He is also keenly aware of the need to remove the Pershing II's if his doctrine is to be fully implemented.

Changes in Soviet Military Doctrine

Through new force alignments and operational changes, the Soviet Union is constructing a military which they believe to be capable of conducting strategic deep encirclement operations to occupy Western Europe in a new "lightning war." The essence of the strategy is to fight and to win against NATO without resorting to nuclear weapons if possible.

Shortly after Ogarkov became chief of the personnel staff, the new Soviet doctrine for fighting theater war was promulgated. This modern doctrine required the Soviet armed forces to fight and to achieve victory at the conventional level while manufacturing a preparedness to preempt enemy use of nuclear weapons.

As chief of the general staff, Ogarkov was responsible for developing and implementing the strategy, plans, organizational changes, and revisions of Soviet operational art. Examples of fundamental changes and developments under Ogarkov's command include:

—The resurrection and modification of the World War II mobile group concept now called the operational maneuver group (OMG).

—The introduction of new air assault brigades which along with conventional airborne forces round out Soviet ground force deep-strike capability.

—All Soviet army divisions, motor, rifle, and tank, have been transformed into highly mobile combined arms forces in line with the new Soviet emphasis on mobility and independent operation.

—Increased mechanization of the airborne forces.

—Integration of helicopters and fixed-wing aircraft into the combined arms team.

—Integration of naval forces into the theater offensive.

—Change in the Soviet method of approach marches in order to avoid dispersible munitions. Rather than moving in division columns as in the past, the latest doctrine calls for cross-country movement in battalions and regiments thereby presenting NATO forces with too many moving targets to engage effectively.

—The strategic deep operation developed by Ogarkov—the operational maneuver group on a strategic scale—involves:

—The capture or destruction of NATO political centers.

—The interdiction of sea lines of communication.

—The distruption of command, control, and communications.

—The destruction of NATO nuclear assets and other elements critical to NATO defense.

The success of Ogarkov's strategic deep operations depends upon the close cooperation of modern naval, ground, and air forces.

Requirement for Sophisticated Conventional Weapons Technology

In late 1984, a new edition of "Taktika" (Tactics), the basic Soviet military text for company and field grade officers, was issued, replacing the 1966 edition. The text reflects Ogarkov's thinking throughout. Less emphasis is given to nuclear weapons while more emphasis is given to combined arms operations developing initiative in junior officers.

Significantly, superiority is to be achieved through sophisticated conventional weapons technology. The acquisition of such an advanced capability hinges on the ability of the Soviet Union to obtain technology either overtly through normal commercial transactions—or scientific and technical exchanges—with the developed countries of the Free World or through covert means.

In his 1985 book "History Teaches Vigilance"—a book highly praised by official Soviet publications—Ogarkov stresses the importance of increasing the economic potential of the Soviet Union in order to develop the defense capabilities required to counter and to defeat the West.

The expansion of West-East trade by the United States and OECD countries facilities Marshal Ogarkov's requirements for military modernization in the field of conventional weapons.

Marshal Ogarkov as Supreme Commander of the Western Theater of Military Operations

After he became Supreme Commander of the Western Theater of Military Operations, Ogarkov established at Minsk a permanent headquarters and staff for this wartime entity.

Such an unprecedented step means that the entire operational military force of the Warsaw Pact for peacetime exercises and in wartime is under Ogarkov's command.

Ogarkov is one of the most able military figures in Soviet and in Russian history. Among his achievements he has:

—Developed the strategic deep operation;

—Organized a military force that the Soviets believe can win in a confrontation with the NATO Alliance;

—Equipped that force with what it requires to accomplish its mission; and

—Has been assigned the most responsible and critical position in the entire Soviet military; namely, establishment as the Supreme Commander of the Western Theater of Military Operations.

Implications for the INF Treaty

With the removal of the Pershing II missiles from NATO Europe, the Western Alliance loses its most important deterrent system. The Pershing II missile has been the key to deterrence in the European Theater owing to such characteristics as accuracy and promptness which place targets of military value deep within the Soviet Union at high risk.

As the INF Treaty currently stands, the Soviet Union does not sustain a parallel loss in its deterret capability. This is because the Soviet Union (1) may well possess significantly more SS–20 missiles than are accounted for in the treaty, (2) the Soviet Union is developing the variable-range SS–25 as a substitute which will not be controlled by the Treaty, (3) the SS–25 missile which is not under the Treaty can be employed effectively in a theater nuclear mode, and (4) the ability of the Soviet Union to violate the terms and spirit of the INF Treaty using SS-25 launchers and garages to accommodate covert SS–20 deployment.

The consequence of this situation is an asymmetry in intermediate-range nuclear missiles. Western deterrent capability through the medium- of intermediate-range nuclear systems is eliminated while the Soviet Union and the Warsaw Pact retain their intermediate-range nuclear capability in the European theater.

This asymmetry is exacerbated by the very significant asymmetry between NATO and Warsaw Pact conventional forces. This conventional force imbalance redounds to Soviet advantage owing to their massive numerical superiority in armor and in other critical elements of warfighting capability ground, air, and naval.

In such a situation, the NATO Alliance is dangerously vulnerable from an objective military standpoint. Such vulnerability can be manipulated by the Soviet Union through psychological operations in order to neutralize Western Europe politically and diplomatically. With Western Europe neutralized and Finlandized, the Soviet Union is able to devote its attention and power more fully to the confrontation with its "main enemy", the United States.

Measures to Stabilize European Theater

Accepting the above consequences of the INF Treaty as it stands, the Western Alliance has several options to attempt to redress the balance of forces in Europe. Among these are:

1. The NATO allies can substantially increase their conventional capability in terms of hardware and men under arms in order to counter Soviet conventional superiority.
2. The NATO allies can attempt to restrain the development and modernization of Soviet conventional military capabilities by controlling the export of goods, technology, hard currency, and credit to the Soviet Union and to Warsaw Pact countries.
3. The NATO allies can introduce systems such as the neutron family of weapons in order to counter Soviet conventional superiority.

C. WHEN TO BRING HOME THE TROOPS

One question underlying the INF Treaty is: How exposed are our troops in Europe as a result of the Treaty and whether they should be brought home.

The U.S. deployment of the INF missiles as a part of NATO serves not only as a deterrent on behalf of Western Europe, but also as an added safeguard to deter aggression against Western troops—including over 300,000 American service men and women stationed in Europe.

Gen. Bernard Rogers has been perhaps the most eloquent spokesman outlining the military dangers of the proposed treaty. As former Supreme Allied Commander in Europe, General Rogers has firsthand familiarity with the assessment of Soviet military. He testified before both the Armed Services and Foreign Relations Committees that the INF Treaty would leave NATO militarily weaker than at present.

General Rogers has pointed out the tremendous superiority of the U.S. Pershing II missile, which would be eliminated under the Treaty. General Rogers described the Pershing II's impact on the Soviets:

> * * * I am concerned over the elimination of the [Pershing II's], the theater-based system that the Soviets fear most. The [Pershing II's], when coupled with the U.S. stretegic nuclear forces, would keep the credibility of NATO's deterrence very high in the Soviets' mind. They could foresee the pain the West could bring to bear should the [Warsaw Pact] aggress. Second, elimination of the GLCM's and [Pershing II's] reduces the number of escalatory options available for use by political authorities, should circumstances dictate. The total impact of losing these two key tools is that the credibility of NATO's de-

terrence is reduced in the Soviet mind, and the future security of the West—including the United States—will be affected.

Indeed, the Soviet respect for the Pershing II's was recently admitted by a high-ranking Soviet military official. Dmitriv Yazov, candidate member of the CPSU Central Committee Politburo and Minister of Defense, stated on Soviet television on February 9:

> From the military point of view, the first such circumstance is that the United States is eliminating in Europe its medium-range missiles which, in relation to the Soviet Union, are strategic missiles to all intents and purposes. They can reach the whole European territory in a flight time of 8–10 minutes, which in practical terms makes it very unlikely that any anti-missile defense would work.

Despite this impressive ability—not matched by other, remaining nuclear forces—the administration has contended that the Treaty is in the U.S. security interest. The Armed Services report is hesitant at best, when it states that the INF Treaty "can make a modest but useful contribution to NATO security."

Other assessments have been less generous. Former Secretary of State Kissinger, while supporting ratification, concluded that there were no military advantages to the United States in doing so.

Former U.N. Ambassador Jeanne Kirkpatrick also commented, before the Armed Services Committee, that the Treaty makes "Europe somewhat more vulnerable and the Soviet Union somewhat less vulnerable, and the alliance somewhat weaker" (although she, too, urges ratification).

The Former U.S. Ambassador to France, Evan Galbraith, testified that the Treaty "sets us on a slippery slope, and we will not stop sliding until Germany is denuclearized, neutralized, and demilitarized," a sentiment which has been echoed by General Rogers.

And what are the consequences for U.S. troops? The nuclear deterrent available to them—and to Western Europe—are primarily so-called battlefield nuclear weapons, with ranges no more than 66 miles. General Rogers has described the remaining weapons as follows:

> * * * What is the composition of the remainder? A few maritime nuclear depth charges with zero range. Hundreds of artillery-fired atomic projectiles with a range of 9 miles. About 80 Lance missiles with 66-mile range. (Both the artillery and the Lance would need to be sited well behind the front-line troops to reduce their vulnerability to enemy fire, thus reducing their effectiveness.) * * * The other system remaining consists of bombs to be delivered by NATO aircraft (range: 180–200 miles), with the U.S. F–111 being the only one that could penetrate the [Warsaw Pact] air defenses. Should we expect these residual forces to conjure up a perception of pain in the Soviet mind? Hardly.

General Rogers has also pressed for the linkage of nuclear arms control agreements with a reduction in the Soviet conventional advantage throughout Europe. His recommendations were rebuffed. Our negotiators engaged in what he termed "preemptive concessions"—that is, "the Soviets won't agree to such linkage, so we won't try to get it."

Should our troops be exposed to the overwhelming Soviet conventional and chemical advantage in the fact of these residual nuclear forces which scarcely serve as a deterrent? In my judgment, the desirability of their continued presence has been cast in doubt.

There is no doubt however, about what should be done if various NATO allies adopt the so-called third zero—the elimination of nuclear weapons with a range less than 500 kilometers. U.S. troops should be removed immediately.

Former Defense Assistant Secretary Richard Perle testified before the committee:

> I do not know how we, in good conscience, could ask 300,000 American troops to serve as poorly defended, as poorly protected as they would be, if they had no nuclear weapons.
>
> Given the fact that the Soviets would, of course, have nuclear weapons that could reach our troops, and they would be permitted in the absence of a nuclear threat emanating from our side to use their conventional capability in a much more effective way.
>
> So, I would not want to ask our troops to stay under those circumstances.

Similarly, Former Secretary of State Henry Kissinger also pointed out the dangers of permitting our troops to remain in West Germany, for instance, if that country adopted the third zero option:

I would welcome an expression of the Senate that the denuclearization of the Federal Republic would carry those consequences [withdrawal of U.S. troops]. [For] third zero option, I think that would be a very appropriate thing to do.

Indeed, in my judgment, the Senate should take the opportunity during the process of considering the INF Treaty to notify our allies that such would be the consequences of total denuclearization in any Western European country.

X. HISTORY OF SOVIET NONCOMPLIANCE IN ARMS CONTROL

> I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging the future but by the past. Patrick Henry's speech to the Virginia Convention in 1775.

It never ceased to amaze me how witness after witness would admit that the Soviets have a consistent record of violating arms control treaties and then proceed to come to the conclusion that in the case of the INF treaty, either (*a*) the Soviets have no incentive to cheat, (*b*) even if they did cheat, it would not matter, or (*c*) the Soviets have changed, and would not cheat.

A more realistic view was presented by former Defense Secretary Caspar Weinberger during testimony on February 2:

> They have cheated in the past. I think we can expect they will cheat in the future whenever they decide it is in their national interest to do so.

The Soviet Union has violated just about every treaty they have ever signed with the United States—especially arms control treaties. The Kremlin knows it has violated these treaties, and knows that Washington is aware of these violations.

For the United States to continue ratifying new treaties while the Soviets remain out of compliance with prior agreements sends a clear signal to the Kremlin that compliance is just not a serious issue to the United States.

This, in turn, invites the Soviets to violate the INF Treaty, and sends a signal to the Kremlin's negotiators in Geneva that they can go ahead and negotiate a START treaty full well intending for it to be violated.

SUMMARY HISTORY OF OFFICIALLY CONFIRMED SOVIET VIOLATIONS OF INTERNATIONAL SECURITY TREATIES SINCE 1917

Official U.S. Government Documentation of Soviet Treaty Violations

Thirty-three years ago, on August 1, 1955, the Senate Committee on the Judiciary filed an important official report on Soviet treaty violations. This report was followed by similar Senate Judiciary Committee reports on January 1, 1959, and January 1, 1964. The Department of Defense made an executive branch official report on Soviet treaty violations on November 5, 1962.

These four official reports covered more than 150 Soviet international security treaty violations from 1917 through 1964.

However, for the next 20 years, there was total, complete silence with regard to Soviet treaty violations.

On January 23, 1984, that official, U.S. Government silence ended with President Reagan's first report to Congress on Soviet SALT violations. That first report established Ronald Reagan as the first President officially to accuse the Soviet Union of violating SALT treaties.

It was a historic report, because it broke the 20-year silence from official Washington on Soviet violations of international security treaties.

Since that January 23, 1984 Presidential Report to Congress on Soviet SALT Violations, there have been six more, for a total of seven official reports to Congress on Soviet SALT cheating. These reports establish a still-expanding pattern of over 50 Soviet violations of SALT and other arms control treaties.

These seven Reagan administration reports, together with the previous four 1955–1964 reports from both the legislative and the executive branches, are of significance for U.S. security and world peace. Without Soviet compliance with arms control and international security treaties, there can be no ordeal in international relations and no reliable security arrangements not wholly based on military might.

In sum, now there is a total of 11 official U.S. Government reports to Congress conforming over 200 Soviet international security treaty violations. These official reports establish the fact that the Soviets always have cheated on their solemn legal commitments to comply with international security treaties.

Soviet noncompliance with treaties will inevitably increase the risk of war. That is why the chief American arms control negotiator in Geneva, our distinguished Ambassador Max Kampelman, himself stated recently that "it is essential in our negotiations in Geneva that we highlight the issue of Soviet violations of existing arms control agreements, even though they will yell like stuck pigs."

But as Lenin stated in 1916, "every peace program is a deception * * * unless its principal object is * * * the revolutionary struggle."

Soviet Violations 1920 Through 1960

The most important Soviet violations of international security treaties between 1920 and 1960, as summarized from the official 1962 Defense Department report, are as follows:

1. On May 7, 1920, the new Soviet regime signed a treaty with the independent Georgian Republic, pledging no interference in Georgia's international affairs. The Soviet Violation: On February 11 and 12, 1921, Soviet troops invaded Georgia, in a step leading to the absorption of the Republic into the U.S.S.R.
2. On March 16, 1921, in a trade agreement with Britain, the Soviet Union pledged not to engage in propaganda in Britain. The Soviet Violation: On May 26, 1927, Britain ended the agreement because of Soviet violations, including Soviet failure to stop propaganda inside Britain as promised.
3. On June 5, 1922, the Soviet Union concluded a friendship agreement with Czechoslovakia. The Soviet Violation: On June 29, 1945, the U.S.S.R. compelled Czechoslovakia to cede the Carpatho-Ukraine to the Soviet Union.
4. On December 12, 1943, the U.S.S.R. and the Czech Government-in-exile signed a treaty of friendship and mutual assist-

ance. The Soviet Violation: On February 25, 1948, the Czechoslovakian Government was forced to accept a Communist ultimatum as the Soviet Union completed arrangements to force the country into its satellite empire. The Soviet ultimatum compelled the appointment of a cabinet of Moscow followers, and it climaxed the Soviet postwar drive to absorb the once-independent Czechoslovakia.

5. On December 17, 1925, the U.S.S.R. signed a nonaggression and neutrality pact with Turkey. The Soviet Violation: On March 20, 1945, the U.S.S.R. denounced this pact, and began a campaign to secure control of the Black Sea straits.

6. On August 31, 1926, the Soviet Union concluded a nonaggression pact with Afghanistan. The Soviet Violation: On June 14, 1946, the U.S.S.R. forced Afghanistan to cede the border territory of Kishka.

7. On September 28, 1926, the Soviet Union made a nonaggression pact with Lithuania, later extending the agreement through 1945. The Soviet Violation: On June 15, 1940, Soviet troops invaded Lithuania. On August 8, 1940, Lithuania was annexed by the Soviet Union.

8. On September 27, 1928, the Soviet Union adhered to the Kellog-Briand pact for the renunciation of war. The Soviet Violation: The Soviet Union violated this pledge by their 1939–40 invasions of Poland, Lithuania, Latvia, Estonia, Romania, and Finland.

9. On January 21, 1932, the U.S.S.R. agreed to a nonaggression pact with Finland. The Soviet Violation: On November 30, 1939, Soviet military forces invaded Finland.

10. On February 5, 1932, the Soviet Union signed a nonaggression pact with Latvia. The Soviet Violation: On June 16, 1940, Soviet Troops invaded Latvia.

11. On May 4, 1932, the Soviet Union pledged nonaggression in an agreement with Estonia. The Soviet Violation: On June 16, 1940, Soviet military forces invaded and occupied Estonia.

12. On July 25, 1932, the Soviet Union signed a nonaggression pact with Poland. The Soviet Violation: On September 17, 1939, Soviet troops invaded Poland.

13. On May 8, 1934, the U.S.S.R. and Poland extended their nonaggression pact for ten years. The Soviet Violation: On September 29, 1939, the U.S.S.R. signed an agreement with Nazi Germany to partition Poland.

14. On June 9, 1934, the U.S.S.R. agreed to recognize Romania, and to guarantee her sovereignty. The Soviet Violation: On June 27, 1940, the Soviet army invaded and occupied the Romanian provinces of Bessarabia and Northern Bukovina.

15. On September 15, 1934, the U.S.S.R. entered the League of Nations, pledging thereby "the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." The Soviet Violation: On August 23, 1939, the U.S.S.R. made a treaty with Nazi Germany, termed "a joint conspiracy" to deprive Poland, Estonia, Latvia, Lithuania, Finland, and Romania of their independence and territorial integrity.

16. On August 31, 1937, the Soviet Union signed a nonaggression pact with the Republic of China. The Soviet Violation: On October 2, 1940, the U.S.S.R. broke relations with the Republic of China, after recognizing the Communist Chinese regime it helped to eventually gain power in 1948.

17. On July 30, 1941, the U.S.S.R. concluded an agreement with the Polish Government-in-exile, pledging mutual aid and cooperation. The Soviet Violation: On April 28, 1943, the U.S.S.R. broke its relations with the Polish Government-in-exile, on the pretext of the Polish request for a Red Cross investigation of the Katyn Forest Massacre.

18. On September 24, 1941, the Soviet Union pledged aherence to the Atlantic Charter, which provided that agreeing countries seek no aggrandizement, that the countries desired no territorial changes not made with the freely expressed wishes of the people concerned, and that they respected the right of all peoples to choose their own government. The Soviet Violation: Against these promises stands the Soviet Union's record of occupation and domination of Romania, Estonia, Latvia, Lithuania, Czechoslovakia, Tannu Tuva, Afghanistan territory, Hungary, East Germany, Albania, Bulgaria, Poland, North Korea, and Mongolia.

19. On January 29, 1942, the Soviet Union, with Iran and Britain, signed a treaty of alliance, providing for the military use of Iranian territory only until the end of military operations against Germany. The Soviet Violation: The Soviet Union refused to withdraw its troops from Iran at the end of World War II.

20. On February 4–11, 1945, at the Yalta Conference, the U.S.S.R. agreed on various postwar measures, including adoption of a resolution that the liberated peoples of Europe should have the opportunity to solve their economic problems by democratic means. The Soviet Violation: In violation of this agreement stands the U.S.S.R.'s record of domination in Bulgaria, Romania, Poland, East Germany, Hungary, and Czechoslovakia, and other countries which were forced into postwar roles as satellites of the Soviet Union.

21. On February 11, 1945, the U.S.S.R. at the Yalta Conference, agreed to a declaration that the Polish provisional government "shall be pledged to the holding of free and unfettered elections as soon as possible on the basis of universal suffrage and secret ballot." The Soviet Violation: On January 5, 1947, the Soviet Union refused to participate in the meeting with the United States and Britain to secure compliance with the 1945 agreement pledging free elections in Poland.

22. On April 11, 1945, the U.S.S.R. signed a 20-year treaty of friendship, mutual aid, and cooperation with Yugoslavaia. The Soviet Violation: On September 29, 1949, the U.S.S.R. denounced this agreement.

23. On June 14–18, 1945, President Truman and Premier Stalin agreed, in an exchange of letters, to "free access by air, road, and rail, from Frankfurt and Bremen to Berlin for U.S. forces." The Soviet Violation: From April 1, 1948, to May 12, 1949, the Soviet Union imposed the Berlin Blockade by sever-

ing all land and water routes between Berlin and West Germany. The Western Allies supplied Berlin by airlift. In March, 1962, the Soviet Union harassed flights by Allied airplanes between Berlin and West Germany.

24. On July 17 to August 2, 1945, at the Potsdam Conference, the U.S.S.R. agreed that there should be uniform treatment of the German people throughout Germany. The Soviet Violation: East Germany today continues to be a rigidly controlled Soviet satellite. Its people have been denied free elections, have been isolated from the people of West Germany, and have been victimized by the same kind of regimentation, police rule, and economic restrictions imposed on the people of the Soviet bloc states in Europe.

25. On August 14, 1945, the Soviet Union entered into a treaty with the Republic of China, containing these pledges: "Each high contracting party undertakes not to conclude any alliance and not to take any part in any coalition directed against the other high contracting party * * * the treaty comes into force immediately * * * and shall remain in force for a term of 30 years." The Soviet Violation: On February 14, 1950, these pledges were broken when the U.S.S.R. made a new agreement with the Communist Chinese regime it had helped to create. The Soviets did not even bother to change the basic wording. The new treaty also pledges: "Both high contracting parties undertake not to conclude any alliance against the other high contracting party and not to take part in any coalition or actions or measures directed against the other high contracting party * * * The present treaty will be valid for 30 years."

26. On March 10, 1947, the Soviet Council of Ministers, meeting in Moscow, agreed that all German prisoners of war should be repatriated by December 31, 1948. The Soviet Violation: On August 3, 1955, the Soviets furnished the West German Red Cross with data on the health and whereabouts of only 20 of the approximately 14,000 Germans known to be still held in the U.S.S.R.

27. On May 7 and June 20, 1949, Four Power Agreements of New York and Paris guarantee the United States, British, French, and Soviet joint control of Berlin, all access routes to and from the city, and freedom of movement within the city. The Soviet Violation: On September 20, 1955, the U.S.S.R. unilaterally transferred Soviet control over all access routes to and from Berlin to the East German regime.

28. On July 27, 1956, the military armistice was established between the United Nations command and opposing Communist forces of North Korea and China, assisted by the U.S.S.R. The Armistice Agreement pledged signers to "cease introduction into Korea of reinforcing military personnel." The Soviet Violation: On July 11, 1956, the United Nations command detailed a long list of armistice agreement violations by Communist parties. On May 6, 1957, the U.N. command, in another series, of official complaints, charged that the Communists had sent troops into Korea's demilitarized zone six times in a period of less than 4 months.

29. On January 14, 1956, the U.S.S.R. signed an agreement with Yugoslavia, pledging $110 million in credits for industrial construction. On August 4, 1956, the U.S.S.R. pledged an additional grant of $175 million; bringing the total to $285 million. The Soviet Violation: On May 28, 1958, Yugoslav sources disclosed that the Soviet Union had postponed for 5 years the grant to Yugoslavia amounting to $285 million. This represented an attempt to retaliate against Yugoslavia for its refusal to accept the Soviet Communist Party's ideological leadership.

30. On October 19, 1956, the U.S.S.R.-Japanese joint declaration pledged the Soviet Union to refrain from interference in Japan's internal affairs. The Soviet Violation: In 1958, during the weeks preceding the Japanese elections of May 22, the Soviets beamed radio propaganda at Japan violently opposing the election of Premier Kishi's government. Between 1959 and 1960, the U.S.S.R. threatened Japan with the possibility of nuclear war if Japan ratified the United States-Japan security treaty, signed January 19 1960.

Soviet SALT Violations

On January 23, 1984, President Reagan made his first report to Congress on Soviet SALT violations. There have now been seven such reports to Congress, confirming the following numerical tabulation of Soviet violation of SALT and other arms control treaties:

1. SALT I ABM Treaty—now 10 confirmed violations;
2. SALT I Interim Agreement—5 confirmed violations;
3. SALT II Treaty—now 25 confirmed violations;
4. Limited Test Ban Treaty—over 30 confirmed violations;
5. Threshold Test Ban Treaty—over 24 probable violations;
6. Biological Warfare Convention—multiple confirmed violations;
7. Geneva protocol on Chemical Weapons—multiple confirmed violations;
8. Kennedy-Khruschev Agreement—multiple confirmed violations.

In addition, long before SALT began in 1969, the Soviets violated two significant arms control treaties, one in the 1920's, which even entailed onsite inspection (The Soviets collaborated with the Germans in violating the Versailles Treaty), and another in the late 1940's (on demobilization in Eastern Europe). Soviet authorities on international law have candidly stated their view of treaty compliance: "Those institutions of international law which can facilitate the accomplishment of the stated tasks of Soviet (i.e. Marxist-Leninist) foreign policy are recognized and applied in the U.S.S.R.; those which contradict these aims in any way is rejected.

According to an official U.S. State Department Soviet Affairs Note dated August 10, 1959:

> Few nations can match the U.S.S.R. in vociferous protestations of loyalty to international obligations. However, such declarations which are typical of Soviet propagandists and scholars alike—diverge widely from Soviet practice. In the years since the Bolshevik Revolution the Soviet Government, while consistently accusing others of bad faith in international dealings, has not hesitated to violate its own treaty obligations

when such actions appeared to be in their best interest. The history of the last 40 years provides numerous examples of deliberate treaty violation by the Soviet regime * * * The U.S.S.R. has disregarded treaty provisions inconvenient to itself, has unilaterally denounced conventions to which it is a party, has threatened abrogation as a means of intimidation, and has on several occasions attacked fellow signatories to treaties of friendship and nonaggression.

The implications of Soviet noncompliance were stated by President Reagan in his June 1985 report to the Congress on SALT II violations. The President stated, "* * * this pattern of Soviet noncompliance raises fundamental concerns about the integrity of the arms control process, concerns that—if not corrected—undercut the integrity and viability of arms control as an instrument to assist in ensuring a secure and stable future world." The President continued, "* * * we have made it absolutely clear that we expect the Soviet Union to take positive steps to correct their noncompliance and to resolve our compliance concerns in order to maintain the integrity of existing agreements and to establish the positive environments necessary for the successful negotiation of new agreements."

On March 10, 1987, the President stated in his sixth report to Congress on Soviet SALT violations that: "If we are to enter agreements of this magnitude and significance * * * cheating is simply not acceptable." And the President added in a speech on October 28, 1987, that: "As you know, the Soviets have an extensive record of violating past arms control agreements * * *" President Reagan added in a speech on November 18, 1987: "I cherish no illusions about the Soviets * * * for them, past arms control treaties were like diets. The second day was always the best, for that's when they broke them."

Detailed List of Soviet Arms Control Treaty Violations

We must finally turn to a summary of Presidential confirmed Soviet SALT and other arms control treaty violations.

I. Presidentially Confirmed Expanding Pattern of Soviet SALT II Violations—Total of 25

President Reagan recently reported to Congress that: "A number of (Soviet) activities involving SALT II constituted violations of the core or *central provisions* of the Treaty frequently cited by proponents of SALT II as the primary reasons for supporting the agreement * * * In no case where we determine that the Soviet Union was in violation (i.e. of SALT II and SALT I) did they take corrective action."

A. SS-25 Mobile ICBM—Prohibited Second New Type ICBM

1. Development since about 1975;
2. Flight-testing (irreversible) since February, 1983;
3. Deployment since 1985—over one hundred concealed mobile launchers, "direct violation;"
4. Prohibited rapid-refire capability—double force;

5. RV-To-Throwweight Ration (and doubling of throwweight over old SS–13 ICBM)—probable covert SS–25 2 or 3 MIRV capability—"direct violation", plus reporting testing of 3 MIRV SS–25;

6. Total encryption of SS–25 telemetry, "direct violation."

B. Strategic Nuclear Delivery Vehicles

7. *De facto* Strategic Nuclear Delivery limit of 2,504—the Soviets have long been at least 75 to 600 SNDV's over even the 2,504 number only they had when SALT II was signed in 1979, thus illustrating the fundamental inequality of SALT II. The Reagan Administration stated in September, 1987: "The Soviet Union *continues to exceed* the *de facto* SALT II overall Strategic Nuclear Delivery Vehicles (SNVD's) ceiling of 2,504. Their ongoing deployment of SS-X–25 ICBM launchers, TU–95 Bear H Bombers, and SLBM launchers carried by Delta IV and Typhoon submarines, plus the presence of SALT II-accountable SS–X–24 ICBM launchers and Blackjack bombers results in the Soviets exceeding the SNDV limit by about 25. The Soviets have not compensated adequately for these new weapons, primarily because insufficient numbers of older Bison bombers and SS–11 ICBM silos have been dismantled." The CIA and ACDA also stated in October, 1987, that the number of Soviet SNDV's "*remains greater* than the 2,504 SNDV's recognized as permitted by SALT II."

C. SS-N-23 SLBM

8. Heavy throw weight prohibited (conclusive evidence);
9. Development since about 1975;
10. Flight testing (irreversible);
11. Deployment on Delta IV and III Class submarines;
12. Total encryption of telemetry.

D. Backfire Intercontinental Bomber

13. Arctic basing, increasing already intercontinental operating capability;

14. Probable refueling probe, actually widely detected, increasing intercontinental operating capability;

15. Production of more than thirty Backfire bombers per year, for an estimated 5 years, making at least more than an estimated 12 extra illegal Backfires produced.

E. Camouflage, Concealment, Deception

16. Expanding pattern of camouflage, concealment, and deception (Maskirovka), deliberately impeding verification.

F. Encryption

17. Total encryption of ICBM, SLBM, and all other missile telemetry.

G. Launcher-ICBM Missile Relationship

18. Reported probable concealment of the relationship between the SS–24 missile and its mobile ICBM launchers, and confirmed concealment of the relationship between the SS–25 missile and its mobile ICBM launchers.

H. SS-16

19. Confirmed concealment deployment of 50 to 200 banned SS-16 mobile ICBM launchers at the Plesetsk test range, now reportedly probably being replaced by a similar number of banned SS-25 mobile ICBM launchers. SS-16's replaced at Plesetsk are unlocated, and are now probably deployed covertly.

I. Falsification of SALT II Data Exchange

20. Operationally deployed, concealed SS-16 launchers not declared;

21. AS-3 Kangaroo long-range air-launched cruise missile range falsely declared to be less than the 600-kilometer range limit and therefore was not counted, even though its range was at least 650 kilometers.

J. Excess MIRV Fractionation

22. According to press reports, the current National Intelligence Estimate states that the 308 SS-18 superheavy ICBM's are deployed with 14 warheads each, adding 1,232 Soviet warheads.

23. According to press reports, the Soviet-*Super*-superheavy SS-X-26 (the followon to the SS-18) is now being flight-tested on the polar trajectories simulating first strike attacks aimed at Pearl Harbor—sovereign U.S. territory, and its deployment is being *acclerated* in converted SS-18 silos. This Soviet flight-testing and accelerated deployment of the even heavier throwweight followon to the superheavy SS-18 ICBM violates the SALT II absolute ceiling on SS-18 throwweight. This new super-superheavy ICBM, the SS-X-26, is also being tested with more RV's than the number carried on the SS-18. This development certainly will result in further excess MIRVing of the SS-18 class of missiles.

Additionally, the Soviets have now probably deployed more than 50 concealed SS-24 rail mobile; MIRVed ICBM launchers. First deployment of this missile was actually confirmed to President Reagan at the Iceland Summit on October 11, 1986, by Soviet Leader Gorbachev himself.

The Reagan administration confirmed on August 7, 1987, that: "The Soviet Union has *exceeded* the SALT II sublimit of 1,200 permitted MIRVed SLBM's when the fifth Typhoon submarine recently began sea trials. Moreover, some SS-X-24 MIRVed ICBM rail-mobile launchers should now be accountable under the SALT II sublimit on MIRVed ICBM's. It appears that the Soviets have not yet compensated for any of the SALT II accountable SS-X-24 launchers. Therefore, the Soviets may also have *exceeded* the SALT II sublimit of 820 MIRVed ICBM launchers."

The Reagan administration later in September, 1987, also confirmed the following statement to be accurate and unclassified at that time: "The fact that the Soviet Union has *exceeded* the SALT II sublimit of 820 MIRVed ICBM's with their SS-24 deployment is now clear. Moreover, the Soviets have clearly *exceeded* the SALT II sublimit of 1,200 MIRVed ICBM's and MIRVed SLBM's. The Soviet Union has not compensated for their SS-24 deployment or for their Typhoon and Delta IV submarine deployments exceeding the SALT II sublimits."

The Reagan administration also confirmed the following statement to be accurate and unclassified as of October 1987: "Current information indicates that the Soviets are *still over* their 1,200 sublimit of SALT II, although the same information indicates that the Soviets could come into compliance at any time."

This confirmed Soviet MIRV missile deployment above the 1,200 MIRV missile sublimit is the 23d confirmed Soviet SALT II violation.

And the 24th confirmed Soviet SALT II violation is the Soviet deployment of now over 50 SS-24 rail-mobile MIRVed ICBM's in violation of the 820 MIRV ICBM sublimit.

Finally, the CIA has publicly warned that, in the event that Soviet SALT II "break out" could be confirmed, the United States should consider that the Soviets are also violating the third SALT II sublimit—1,320 MIRVed missiles and heavy bombers equipped with long-range cruise missiles. Thus, because the 24 confirmed Soviet SALT II violations clearly constitute Soviet break out from SALT II, the Soviets must also be considered to be violating the 1,320 sublimit.

This would make the total of confirmed Soviet SALT II violations. *25.*

The Soviets reportedly told the U.S. arms negotiators in Geneva in late 1983 that they intended to exceed the SALT II sublimits of 820, 1,200 and 1,320, which they are now confirmed to be doing.

II. Presidentially Confirmed Expanding Pattern of Soviet Violations of the SALT I Interim Agreement—5 Violations

1. Soviet deployment of the heavy SS-19 ICBM and the medium SS-17 ICBM to replace the light SS-11 ICBM was a circumvention defeating the object and purpose of the SALT I Interim Agreement. Article II of the interim agreement prohibited heavy ICBM's from replacing light ICBMs. This violation alone increased the Soviet first-strike threat by a factor of 6.
2. Soviet deployment of modern SLBM submarines exceeding the limit of 740 SLBM launchers, without dismantling other older ICBM or SLBM launchers, which in March 1976, the Soviets actually *admitted* was a violation.
3. Soviet camouflage, concealment, and deception deliberately impeded verification.
4. Circumvention of SALT I by deploying SS-N-21 and SS-NX-24 long-range cruise missiles on converted Y Class SLBM submarines, which "is a threat to United States and allied security similar to that of the original SSBN's.
5. "The United States judges that Soviet use of former SS-7 ICBM facilities in support of the deployment and operation of the SS-25 mobile ICBM is a *violation* of the SALT I Interim Agreement."

As Defense Secretary Weinberger stated on December 11, 1986: "SALT I and SALT II have been largely irrelevant to the Soviet Military buildup. Both agreements merely codified and authorized large increases."

III. Presidentially Confirmed Expanding Pattern of Soviet SALT I ABM Treaty Break Out Violations—10 Violations

1. "The U.S. Government *reaffirms* the conclusion in the March 1987 Report that the new large phases-array radar under construction at Krasnoyarsk constitutes a *violation* of legal obligations under the Anti-Ballistic Missile Treaty of 1972 in that in its associated siting, orientation, and capability, it is prohibited by this Treaty. Construction continued in 1987. The absence of credible alternative explanations have reinforced our assessment of its purpose. Despite U.S. requests, no corrective action has been taken. This and other ABM-related Soviet activities suggest that the U.S.S.R. may be preparing an ABM defense of its national territory." This judgment is "based on *conclusive evidence*, and this is the clearest evidence of Soviet violation of the ABM Treaty. Thus the siting, orientation, and capabilities, of the Soviet Krasnoyarsk ABM Battle Management Radar "directly violates" three provisions of the SALT I ABM Treaty. The Soviets have even privately admitted this violation to themselves. The CIA has stated recently that "The United States is aware that, over the last several years, Soviet officials have indicated that the Krasnoyarsk radar is a violation of the ABM Treaty." During 1987, both houses of the Congress, the U.S. Senate and the U.S. House of Representatives, have each voted overwhelmingly and almost unanimously in agreement with President Reagan that the Krasnoyarsk radar is a clear violation of the ABM Treaty. The Senate also voted 93 to 2 that the Krasnoyarsk violation was *an important obstacle"* to the Senate's advice and consent to the ratification of the new INF Treaty.

2. "The U.S. Government finds that the U.S.S.R.'s activities with respect to moving a flat twin ABM radar and a pawn shop van, a component of an ABM system, from a test range and initiating deployment at a location (i.e. Gomel) outside of an ABM Deployment area or ABM test range constitutes a *violation* of the ABM Treaty. * * * This and other ABM-related Soviet activities suggest that the U.S.S.R. may be preparing an ABM defense of its national territory." In his December 1, 1987, seventh report to Congress on Soviet SALT violations, President Reagan referred for the first time to "*the new violation* in the deployment of the Flat Twin and Pawn Shop observed at Gomel * * *"

3. Over 100 ABM-mode tests of Soviet SAM–5, SAM–10, and SAM–12 surface-to-air missiles and radars are *"highly probable" violations* of the SALT I ABM Treaty. Two high Soviet officials have even admitted that their SAM's have been designed, tested, and deployed with a prohibited ABM capability. "The U.S. Government reaffirms the judgment made in the March 1987 Report that the evidence of Soviet actions with respect to concurrent operations is insufficient fully to assess compliance with Soviet obligations under the ABM Treaty. * * * In recent years, we have gathered *an increased amount of evidence* on activities that could be associated with Soviet concurrent operations * * * the Soviet Union has conducted tests that have involverd air defense radars in ABM-related activities. The large number, and consistency over time, of incidents of concurrent operation of ABM and SAM components, plus Soviet failure to accommodate fully U.S. concerns, indicate the

U.S.S.R. probably has violated the prohibition on testing SAM components in an ABM mode. In several cases, this may be highly probable. This and other such ABM-related activities suggest that the U.S.S.R. may be preparing an ABM defense of its national territory."

4. There is *strong evidence* that Soviets may be developing and deploying a territorial, and especially a nationwide, ABM defense, which violates the ABM Treaty ban on developing even a *base* for a nationwide ABM defense. "The U.S. Government reaffirms the judgment of the March 1987 Report that the aggregate of the Soviet Union's ABM and ABM-related actions (e.g., radar construction, concurrent testing, SAM upgrade, ABM rapid reload, ABM mobility, and deployment of ABM components to Gomel) suggests that the U.S.S.R. may be preparing an ABM defense of its national territory. Our concern continues. * * * The redundancy in coverage provided by these new radars (i.e. the 9 Pechora-Krasnoyarsk class radars) and the disposition of these radars *closely resembles the design of the US Safeguard ABM program.*" The U.S. Safeguard program was designed to be a 12-site, *nationwide* ABM defense. President Reagan has also stated that "this is a *serious* cause for concern." The Secretary of Defense has testified to the Senate that the "Soviets have some nationwide ABM capability " already. In his December 1985 report to Congress on Soviet SALT violations, President Reagan stated that a unilateral Soviet ABM defense: "Would have profound implications for the vital East-West balance. A unilateral Soviet territorial ABM capability acquired in violation of the ABM Treaty could erode our deterrent and leave doubts about its credibility." The CIA has recently stated that: "In totality, these (Soviet ABM) activities provide a strong basis for concern that the U.S.S.R. might have an *integrated plan* for an ABM defense of its national territory, and might be working toward it." Finally, as the Defense and State Department's White Paper on Soviet strategic defense programs of October 1985 confirmed: "The aggregate of current Soviet ABM and ABM-related activities suggests that the U.S.S.R. may be preparing an ABM defense of its national territory—*precisely what the ABM Treaty was designed to prevent.*"

5. The mobility of the Soviet ABM-3 system is a *violation* of the ABM Treaty's prohibition on mobile ABM's.

6. Continuing Soviet development of mobile flat twin ABM radars from 1975 to the present, is a *violation* of the prohibition on developing and testing mobile ABM's. The Soviets evidently are now mass producing the mobile ABM-3 system for rapid nationwide deployment.

7. Soviet ABM rapid reload capability for ABM launchers is a serious cause for concern. The State and Defense Departments state that the Soviets "may" have a prohibited reloadable ABM system.

8. Soviet deliberate camouflage, concealment, and deception activity impedes verification.

9. Confirmed Soviet falsification of the deactivation of the ABM test-range launchers is a violatiuon of the ABM Treaty dismantling procedures.

10. Soviet rapid relocation *without the required prior notification* of a flat twin ABM radar, creating the additional Kamchatka ABM

test range, not only confirms the illegal mobility of the flat twin radar and ABM-3 system, but is a violation of the ABM Treaty.

As Defense Secretary Weinberger stated on December 11, 1986: "There has been the recent discovery of three new Soviet large phased-array radars of this type [i.e. the Pechorca-Krasnoyarsk class]—a 50-percent increase in the number of such radars. These radars are essential components of any large ABM deployment. The deployment of such a large number of radar [i.e. nine], and the pattern of their deployment, together with other Soviet ABM-related activities, suggest that the Soviet Union may be preparing a nationwide ABM defense in violation of the ABM treaty. Such a development would have the *gravest implications* on the United States-Soviet Union strategic balance. *Nothing could be more dangerous* to the security of the West and global stability than a unilateral Soviet deployment of a nationwide ABM system combined with its massive offensive missile capabilities."

IV. Presidentially Confirmed Expanding Pattern of Soviet Violations of Nuclear Test Bans—Over 70 Violations

1. About 20 atmospheric nuclear weapon tests, August through September 1961, were conducted by the Soviets in violation of the 1959 Mutual Test Ban Moratorium. One of these tests reached a yield of 58 megatons.

2. There have been over 30 conclusively confirmed cases of Soviet venting of nuclear radioactive debris beyond their borders from underground nuclear weapons tests, in violation of the 1963 Limited [i.e. Atmospheric] Test Ban Treaty. "The U.S. Government reaffirms the judgment made in the March 1987 Report that the Soviet Union's underground nuclear test practices resulted in the venting of radioactive matter on numerous occasions and caused radioactive matter to be present outside the Soviet Union's territorial limits in *violation* of its legal obligation under the Limited Test Ban Treaty. The Soviet Union failed to take the precautions necessary to minimize the contamination of man's environment by radioactive substances despite numerous U.S. demarches and requests for corrective action. This practice has continued. Since the resumption of Soviet underground testing in February 1987, the United States has presented demarches to the Soviet Union on two separate occasions when unambiguously attributable venting has occurred * * * and received completely unacceptable explanations * * * our repeated attempts to discuss these occurrences with Soviet authorities have been rebuffed * * * Soviet refusal to discuss this matter *calls into question their sincerity on the whole range of arms control agreements.*" (Emphasis added.)

3. There have been over 24 cases of Soviet underground nuclear weapons tests over the 150-kiloton threshold in probable violation of the 1974 Threshold Test Ban Treaty.

V. Presidentially Confirmed Expanding Pattern of Soviet Violations of Biological and Chemical Weapons Bans

1. "Soviet involvement in the production, transfer, and use of chemical and toxic substances for hostile purposes in Southeast Asia and Afghanistan are *direct violations* of the 1925 Geneva Protocol." Tens of thousands of innocent men, women, and children

suffered horrible deaths from these Soviet atrocities, which are also violations of the Genocide Convention.

2. "The Soviets have maintained an offensive biological warfare program and capability in *direct violation* of the 1972 Biological and Toxin Weapon Convention." The United States has absolutely no defenses against this capability. The Sverdlovsk anthrax explosion of April 1979, killing several thousand Soviet soldiers and civilians, is direct evidence of the existence of this illegal capability. "After reports of the events at Sverdlovsk reached the West, the U.S. repeatedly and explicitly approached the Soviet Union for consultation under Article V of the Biological and Toxin Weapons Convention. *The Soviets have consistently refused to engage in consultations, despite their obligation under Article V* * * * The U.S. Government judges that continued activity during 1987 at suspect biological and toxin weapons facilities in the Soviet Union, and reports that a BW program may now include investigation of new classes of BW agents, *reaffirm* the conclusion of the March 1987 Report that the Soviet Union has maintained an offensive biological warfare program and capability in *violation* of its legal obligation under the Biological and Toxin Weapons Convention of 1972. We are particularly concerned because it may include advanced biological agents about which we have little knowledge and against which we have no defense. The Soviets continue to expand their chemical and toxin warfare capabilities. *Neither NATO retaliatory nor defensive programs can begin to match the Soviet effort* * * * There have been no confirmed attacks with lethal chemicals or toxins in Cambodia, Laos, or Afghanistan in 1987 according to our strict standards of evidence. Nonetheless, there is no basis for amending the March 1987 Report conclusion that, prior to this time, the Soviet Union has been involved in the production, transfer, and use of trichothecene mycotoxins for hostile purposes in Laos, Cambodia, and Afghanistan in violation of its legal obligation under international law as codified in the Geneva Protocol of 1925 and the Biological and Toxin Weapons Convention of 1972."

VI. Soviet Violations of the Kennedy-Khrushchev Agreement of 1962

1. "The Soviets *breached* a unilateral commitment by sending offensive weapons—intercontinental nuclear delivery capable bombers, nuclear delivery capable fighter bombers, and various kinds of nuclear missile submarines—back to Cuba, beginning in 1969." The Soviets are thus violating the 1962 Kennedy-Khruschev Agreement prohibiting Soviet offensive weapons in Cuba because of the reported presence of 12 or more TU-95 Bear intercontinental bombers, more than 55 nuclear delivery capable Mig-27 Flogger fighter-bombers, several types of strategic submarine (Golf, Echo, Victor, Yankee, and Foxtrot classes), over 200 nuclear delivery capable Mig-21 fighter-bombers, a nuclear weapons handling and storage facility, a chemical and biological weapons production and storage facility, and the Soviet Combat Brigade. On September 14, 1983, President Reagan for a *second* time confirmed that the Soviet Union had violated the Kennedy-Khruschev agreement when he stated: "That Agreement has been *abrogated* many times by the Soviet Union and Cuba in the bringing of what can only be de-

scribed as offensive weapons, not defensive, there." That statement and an earlier one by President Reagan has been backed up by similar public statements by the CIA Director, the JCS Chairman, and the Undersecretary of Defense for policy, all charging that the Soviets are violating the agreement. And even the State Department concedes that the Soviets are violating the "spirit" of the agreement.

CONCLUSION

As President Reagan stated in his seventh Report to Congress on Soviet SALT violations, dated December 1, 1987: "When taken as a whole, this series [i.e. of seven] reports provides a clear picture of continuing Soviet violations * * * there is a pattern of Soviet noncompliance * * * The compliance concerns enumerated in this report are not unfamiliar to the Soviet Union. I expressed my personal interest in these issues directly to Soviet General Secretary Gorbachev during my meeting with him, both in 1985 in Geneva and then again in Reykjavik in October 1986. In addition, the Standing Consultative Commission discussed compliance concerns in detail during its biannual sessions * * * Most recently, Secretary of State Shultz raised United States concerns about Soviet noncompliance during his October 1987 visit to Moscow * * * the Soviet Union has failed to correct its noncompliant activities * * * strict compliance with all provisions of arms control agreements is fundamental * * * Soviet noncompliance is a serious matter. it calls into question important security benefits from arms control, and could create new security risks. It undermines the confidence *essential* to an effective arms control process *in the future* * * * it will be achieved *only* if effective verification and *total compliance* are integral elements of the process both with respect to existing arms control agreements *and possible new ones.* (Emphasis added.)

In his March 10, 1987 Report to Congress on Soviet SALT violations, President Reagan added: "Strict compliance with all provisions of arms control agreements is fundamental, and this administration will not accept anything less * * * If we are to enter agreements of this magnitude and significance, effective verification is indispensable and cheating is simply not acceptable."

Finally, in his June 1985 Report to Congress on Soviet SALT violations, President Reagan states: " * * * this pattern of Soviet noncompliance raises fundamental concerns about the integrity of the arms control process, concerns that—if not corrected—undercut the integrity and viability of arms control as an instrument to assist in ensuring a secure and stable future world * * * we have made it absolutely clear that we expect the Soviet Union to take positive steps to correct their noncompliance and to resolve our compliance concerns in order to maintain the integrity of existing agreements and to establish the positive environment necessary for the successful negotiation of new agreements." But as President Reagan conceded in his March 1987 report in regard to all Soviet violations of SALT I and SALT II: "In no case where we determined that the Soviet Union was in violation did they take corrective action."

In a letter to the Congress transmitting his December 1, 1987, violations report, President Reagan stated: "Correcting their violations will be a true test of Soviet willingness to enter a more constructive relationship * * * on security matters."

Thus by President Reagan's own 1985 and 1987 standards, there may be a lack of the positive environment necessary for the negotiation of new agreements. In sum, we may question whether arms control treaties have served as an instrument to assist in ensuring a secure and stable future world.

MAKING THE SOVIETS ACCOUNTABLE FOR TREATY VIOLATIONS IN THE INF TREATY

If the Senate ratifies the INF Treaty fully cognizant of this extensive record of Soviet cheating, it sends a clear, if not regrettable, signal to the Kremlin: "Even if you cheat on treaties, we will continue to approve future arms control treaties."

This is a dangerous signal to send; it invites cheating on the INF Treaty, and encourages Soviet representatives in Geneva to negotiate a START treaty full well intending to violate it.

But the Senate need not send this signal. In fact, the Senate can use the INF Treaty as an opportunity to demonstrate once and for all to the Kremlin that the United States is serious about the sanctity of arms control treaties.

Specifically, the Senate should approve an amendment conditioning the exchange of the instruments of ratification on the President certifying to the Senate that, in his judgment, the Union of Soviet Socialist Republics is in substantial compliance with all arms control treaties currently in force between the parties.

This proposal is not a "killer amendment—unless of course, the Soviets refuse to come into compliance with arms control treaties they have already signed with the United States. Once the President is satisfied that the Soviets have come into compliance with existing arms treaties in force between our two countries, then the INF Treaty would go into force.

XI. HUMAN RIGHTS UNDER THE SOVIET UNION: THE PRESENT AS PROPHECY

The INF Treaty was negotiated against the background of a number of United States-Soviet agreements. They provide a useful record of Soviet performance on which to base an assessment of the merits of the present agreement. If deterrence fails as a result of removal of the INF systems from Europe, they provide a picture of what life could become in Western Europe. The present could be prophecy.

During the entire course of the INF hearings, not one witness suggested that the Soviet Union was adequately complying with the treaties which it has already reached with the United States. Instead, proponents of the Treaty argued that we should take this Treaty on its own terms, as though Soviet behavior on other international agreements could teach us nothing about what we could expect in terms of Soviet compliance on INF.

The comments of Secretary Shultz on the opening day of the hearings were very revealing on this point. The Soviet pattern he said, is not one of "wholesale violation," but rather "selective and specific" violations. We should thus address these selective and specific points, he suggests.

This argument has two aspects which invite concern: One can immediately observe that the Secretary's statement sounds much like that of a wronged spouse, who says his partner "does not commit adultery wholesale, but with only one partner at a time." The more serious and abiding observation, however, emerging from weeks of hearings, is that the Soviet Union's violations of existing treaties are not at all isolated, specific, and limited; rather, they are necessary and indispensable ingredients of the totalitarian Soviet strategy to maintain power at home and project power abroad.

The extensive record of Soviet cheating on arms control agreements has already been widely discussed. The present section addresses an area where the Soviet Union's record of compliance reflects a truly wholesale rejection of its Treaty obligations; namely, the human rights dimensions of the relationship between the superpowers addressed by the Conference on Security and Cooperation in Europe, better known as the Helsinki Accords.

The dismal record of Soviet human rights violations admittedly causes irritation and embarrassment to those who advocate increased U.S. trust and cooperation with the Soviets. Thus human rights becomes a forbidden topic in arms control discussions. Yet the Helsinki accords address "Security and Cooperation in Europe," exactly the area dealt with by the INF Treaty. One witness, Martin Colman, of the American Resistance International, was allowed to appear as the last of five panelists of an afternoon hearing, and he made some very telling points.

First of all, Mr. Colman testified, to enact the INF Treaty in the face of massive Soviet and Warsaw Pact violations of the Helsinki accords constitutes an attack on the Helsinki accords themselves. "It is to demoralize the human rights movements of the East bloc and to distance ourselves from our allies and demonstrate that there is a reward, not a penalty, for violation [of] an agreement with us. And the reward is more agreements," said Mr. Colman.

Mr. Colman goes on to explain that, if the United States ratifies INF without confronting the massive Soviet violations of the Helsinki accords, "this would place us, the United States, in clear violation of the accords, which we are obligated to enforce in all our dealings, even unilaterally. To separate these issues now and ratify the INF in the face of these massive violations is to choose between Helsinki and INF."

In the Helsinki accords, the United States has already negotiated an agreement which would provide a solid foundation for the atmosphere of trust which is a prerequisite for any successful compliance and verification regime. The United States should indeed be concerned that our approval of INF with no reference to massive Soviet human rights violations might appear to victims of Soviet atrocities to be an American seal of approval for past Soviet behavior. One simple act by the Senate can avoid such a blow to those persecuted by the Soviets, Mr. Colman explains, which would require neither amendment of the INF Treaty nor any renegotiation with the Soviets: the Senate could set the implementation date of the Treaty, once ratified, "to coincide with the President's public certification that the Soviets are in full compliance with all the terms" of the Helsinki accords.

Of course, the INF Treaty deliberations in the Senate to this point have been profoundly dispiriting to those suffering under Soviet persecution. The uncritical passage of INF without a firm requirement regarding Soviet human rights compliance would be a human rights disaster of the first order. Victims of Soviet bloc repression would conclude that the United States does not really expect the Soviet to live up to past treaty obligations, and they would be right. Could we expect Western Europeans threatened by Soviets S-25's (and by any hidden SS-20's) to draw any other conclusion concerning Soviet obligations under INF?

The massive gulag which the Soviet bloc has imposed on Eastern Europe and the U.S.S.R. represents the pattern of repression which the Soviets hope one day to impose on Western Europe as well, once their goal of domination is achieved. The INF Treaty brings that Soviet goal closer to fruition. Only a strong statement by the Senate demanding Soviet compliance with already existing human rights treaties can avoid sending Europe the message that, while we know of the Soviets plans for Western Europe's future, we will do nothing to deter them.

American politicians periodically issue condemnations of Soviet human rights violations, but seldom do anything about them. The INF Treaty presents us with a rare opportunity to influence Soviet human rights behavior—*if* we are willing to use it. The Soviets desperately want the INF Treaty. Their victims desperately want us to back up our words of comfort with action. That action can be delivered when the INF Treaty is considered on the Senate floor.

Sen. Charles Grassley summed up the link between peace and freedom during testimony on March 3:

> To the Soviet Jews and other national minorities of the Soviet Union, our American Government is the best hope for improvement in their lives. We have the ability to extract concessions for the Soviet Union as it seeks modernization and integration into the Western World. And we must continue to use this leverage.
>
> Peace and freedom are intimately connected. We cannot achieve a genuine and reliable peace with the Soviet Union until those who want to leave are allowed to go, until every Christian, Moslem, and Jew is given the right to practice his religion, and until every national minority is given the opportunity to study and enjoy its culture and heritage. The principles and ideals on which this country was founded demand no less.

In anticipation of the INF deliberations, dozens of groups active in monitoring the situation of the victims of Communist repression behind the Iron Curtain were asked to provide as much information as possible about the present state of freedom, especially fundamental religious freedom, in the Soviet bloc. The following report includes much of that material, and I am grateful for their assistance.

REGIONAL CONFLICTS—AN OVERVIEW

During the past decade, the Soviets have become increasingly involved in support of Communist insurgencies around the world. These efforts are focused primarily in five major areas—Latin America, Afghanistan, Africa, the Middle East, and the Far East.

With the exception of Afghanistan, Soviet support is not generally provided through the direct intervention of Soviet troops, but rather through Soviet-supplied military equipment and extensive training of indigenous combatants. The Soviets also rely upon Cubans to provide direct military assistance and troops in certain areas—most notably, Angola.

The Department of Defense has published the following estimates of Soviet military personnel in these areas of the Third World:

Latin Amer. (including Cuba)	7,900
Sub-Saharan Africa	3,600-4,000
Mideast and North Africa	8,000-9,000
Asia (including Vietnam)	3,500
Afghanistan	116,000

Additionally, it has estimated 38,000 to 41,000 Cuban military personnel in Sub-Saharan Africa, primarily Angola.

The Defense Department estimates that over $5 billion in arms has been provided between 1981-86 to each of the following countries: Libya, Algeria, Syria, and Iraq.

The Soviets often gain access to air and naval bases as a part of their involvement in these conflicts.

The following excerpts from "Soviet Military Power: 1987," published by the Department of Defense, give a summary of Soviet involvement in these areas:

As the Soviet Union emerged as a global power in the 1970's, the nation's military doctrine evolved to match a more activist foreign policy. A stronger, more adventurous Soviet Union had begun to view conflict in the Third World as an avenue for furthering Soviet interests through military assistance and intervention. That view heralded an era of extraordinary and continuing Soviet activism—the 1975 Soviet-Cuban intervention in Angola, the 1977 intervention in Ethiopia, the support for Vietnam's 1978 invasion of Cambodia, and the 1979 invasion of Afghanistan. Early optimist gave way to a less positive view, however, as a number of Moscow's clients faced significant insurgencies. Soviet ideology offered no explanation for these setbacks, and the Kremlin had trouble understanding how an emerging socialist state could find itself subject to popular rebellion.

At the same time, Soviet military thinkers struggled to deal with the new realities and to develop a coherent doctrine defining a possible role for the Soviet Armed Forces in countering these insurgencies. By the end of the Brezhnev era, military writers were labeling the fight against the new insurgencies "wars in defense of socialism" by nations on the "path of socialist development." While this rationale served to justify Soviet actions in support of a friendly state, the Kremlin ideologs still could not acknowledge the possible legitimacy of such opposition. Instead, they blamed it on resurgent imperialist meddling in support of counterrevolutionaries and "bandits" in former colonial states.

These policies have continued under Gorbachev. However, some of these conflicts appear to be producing a significant drain on Soviet resources. Afghanistan and Angola are two areas of the Soviet's longest involvement where they have not been able to solidify support for their clients. Afghanistan continues to require extensive Soviet troops while Angola continues to use up Soviet military equipment.

The following sections amplify on the Soviet involvement in three areas.

THE SOVIET PRESENCE IN AFGHANISTAN

The Soviet Union has militarily occupied Afghanistan since invading the country in December 1979. Since that time, the Soviets have expended considerable energy and manpower to maintain control over the institutions of government and in attempting to subdue the large military resistance to their occupation.

The Soviet military presence in the country has increased from approximately 85,000-90,000 troops in 1980 to approximately 115, 000 troops today. In addition, 30,000-40,000 troops are stationed on the Soviet side of the Afghan border from where they provide support of combat operations and fly missions against the Afghan resistance.

In addition to this military presence, the Soviet Union has exercised effective control over the Afghan government. Soviet control of the Afghan ministry of defense is so complete that no orders may be issued by the ministry without being countersigned by a

Soviet. The Soviets have developed a local version of the KGB, called the KhAD, which has carried out a variety of violent activities such as terrorist bombings in Pakistan.

The military occuption has had a devastating affect on the Afghan people. It has been estimated that one out of every nine Afghans has lost their lives during the occupation, and that one-fifth of the population has fled the country. The Soviets have used the war as a proving ground for new weapons, including chemical weapons and boobytraps aimed at civilian population.

During a visit to Kabul in early January, Soviet Foreign Minister Eduard Shevardnadze suggested that Moscow would withdraw its 115,000 troops during this year. This is the most recent of a series of statements suggesting such a move since General Secretary Gorbechev called for a withdrawal in "the nearest future" back in February 1986.

Whether or not such a withdrawal will take place, however, is open to debate. As Newsweek reported (1/18/88), "Gorbechev's previous peacemaking gestures haven't added up to much. His withdrawal of some 8,000 Soviet troops in October 1986 was pure propaganda, which did not change anything in Afghanistan."

The report also noted that "Last year, before the latest round of the Geneva talks, the Soviets floated optimistic rumors about withdrawal—and then gave up very little at the bargaining table."

Soviet-East European Assistance To Nicaragua and Cuba

Soviet bloc assistance to Communist Nicaragua and Cuba since 1980 has increased dramatically. Military deliveries from the Soviet bloc to Nicaragua and Cuba exceed the cumulative value of United States military assistance by eight to one in the region.

Soviet aid has enabled Nicaragua to build up an armed force with 75,000 troops on active duty, and 60,000 in militia and reserve.

Soviet military aid over the last 20 years has helped Cuba build an armed force of nearly 300,000, with almost 1,000 tanks, about 200 sophisticated fighter aircraft, and a navy that includes submarines, frigates, and high-speed torpedo-firing hydrofoil patrol boats.

Cuba and Nicaragua are both crucial to the Soviet Union for strategic reasons. At least 7,700 Soviet military and intelligence personnel are stationed in Cuba.

Nicaragua receives more than 90 percent of its military assistance from the Soviet bloc countries. Combined economic and military assistance from the Soviet bloc to Nicaragua increased nearly sixteenfold, from $70 million in 1981 to about $1.1 billion in 1986. Furthermore, Cuba has been providing about $50 million in additional economic assistance to Nicaragua annually for the last several years.

In the first 9 months of 1987, Nicaragua's cache of Soviet-supplied military hardware grew by 15,000 metric tons. The Communist Sandinistas now have 39 Mi-8/17 HIP helicopters, and at least 12 Mi-24 HIND D attack helicopters. They also have 150 medium and light-amphibious tanks, and 250 armored personnel carriers and reconnaissance vehicles.

Soviet bloc assistance to Cuba has also increased significantly in the last several years. In 1983, Soviet bloc military and economic assistance to Cuba was about $5.5 billion, and in 1986 that assistance increased to almost $7 billion.

The enormous amount of military assistance from the Soviet bloc countries to both Cuba and Nicaragua presents a significant threat to freedom and stability in the Western Hemisphere. Much of this military assistance has been used to train Marxist-Leninist guerrillas seeking to overthrow democratic countries in Latin America.

Sandinista Militarization Plans

In October 1987, a key Major in the Sandinista army defected to the United States. In December 1987, he made public vital information regarding the future military plans of the Sandinista popular army.

Before his defection, Roger Miranda was chief of the secretariat of the Nicaraguan ministry of defense, and member of the Sandinista assembly (Central Committee). Major Miranda has revealed the following information about the intentions of the Sandinista government in the next 7 years.

—The Soviet Union has promised the Sandinistas Mig-21 fighter aircraft that are now expected to be delivered by 1991.

—The Sandinistas intend to build an army and militia totaling 500,000 people in the next 7 years.

—Many more armored personnel carriers, self-propelled howitzers, antitank weapons, surface-to-air missiles, and antiaircraft guns are expected or already have been delivered.

—Three new 400-ton naval vessels are expected from the Soviet Union.

—The Sandinistas continue to support and train the Salvadoran Communist guerrillas.

Just one day after Major Miranda made his statements to the U.S. press, Defense Minister Humberto Ortega confirmed the allegations about the planned military buildup in Nicaragua. Major Miranda made it clear that the Sandinista government had already made an agreement with the Soviet Union and Cuba regarding a major military buildup. Miranda also stated that it is the Soviet and Cuban advisors who guide the Sandinista government.

The Soviet Presence in Africa

The Soviet presence in Africa has been divided between assistance to Libya and Algeria, as a part of its entree into Middle East affairs, and in sub-Saharan Africa. In the latter cases, the Soviet aid is directed primarily at consolidating Soviet-backed Marxist governments.

Angola

Priorities in sub-Saharan Africa in the past decade have been Angola and Ethiopia, both of which established Marxist-Leninist governments, but which face significant popular opposition.

The current rulers in Angola are the Soviet backed Leninist MPLA. In mid 1975, after the Portuguese colonial government decided to leave Angola, the three anticolonial factions, which included the MPLA and UNITA, agreed in the Alvor accords to create a pluralistic democracy, and hold national elections to determine the makeup of Angola's national leadership. National polls indicated that Jonas Savimbi, the leader of UNITA, would win overwhelmingly. However, the MPLA with the help of the Soviet Union, airlifted 12,000 Cuban troops into Angola and militarily took over the country.

The personal popularity and military effectiveness of Jonas Savimbi has improved the position of the National Union for the Total Independence of Angola (UNITA). Highly motivated opposition forces have had military success beyond their numbers against less motivated Cuban forces, estimated to number 35,000 to 40,000. The United States has provided military assistance to Savimbi since 1985 when the Clark amendment prohibiting such assistance was repealed.

On September 14, 1987, *The New York Times* reported that the 125,000-member combined army of Angolan and Soviet-block forces is one of Africa's most formidably equipped. The combined Communist army in Angola has over 37,000 Cuban troops, 5,000 Soviet and East German advisors, and 80,000 Angolan troops.

Soviet-supplied equipment include some of the most sophisticated in the Soviet arsenal: over 800 tanks; the most up-to-date SAM-8 Soviet antiaircraft batteries (equipped with sophisticated radar and television optical equipment for tracking approaching planes); high performance Mig-23 and Mig-21 fighter jet aircraft; Mi-25/35 HIND helicopter gunships; Mi-8 troop-carrying helicopters; SU-22/Fitter tactical bombers; hundreds of armored personnel carriers; and hundreds of trucks, several convoys of bridge building equipment, clusters of light and heavy artillery batteries; including the BM-21 "Stalin Organ" rocket artillery batteries.

The Communist offensive lauched in July against Savimbi's forces failed. Reports indicate that during one of the most intense battles, the Cubans and Soviets were airlifted by helicopter out of the battle, causing resentment among the remaining Angolan troops who suffered severe casualties.

The New York Times reported on November 22 that "this is the third offensive by the Marxist government that Mr. Savimbi's troops have defeated in as many years." Reports indicated that the UNITA forces seized "very substantial" quantities of recently delivered Soviet weapons—including "dozens of tanks," armored personnel carriers, trucks, and a few SAS-8 and SA-13 antiaircraft missiles.

Captured soldiers and Communist defectors confirmed that the Soviets were furious at their Angolan allies because some of the Soviet's best, top-of-the-line combat equipment was captured in tact by UNITA.

According to one estimate, over $4 billion in Soviet military hardware has been supplied to Angola since 1975. However, the Soviets have been unable to secure areas of the country other than a few cities, towns and certain areas containing economically productive extraction industries such as oil and diamonds.

Cuban defectors have provided valuable information about the situation in Angola. Brigadier-General Rafael Del Pino Diaz, former Cuban Air Chief of staff in Angola, defected to the United States last year. He reported that the Cubans have suffered 10,000 casualties in the Angolan war, and that the Cubans are increasingly resented by civilian Angolans. He also emphasized Angola's strategic importance to the Soviet Union.

The Soviets now operate submarines, destroyers and cruisers from ports in Angola. These ships operate from ports that are within range of two key sealanes, the oil routes around the horn of Africa, and the NATO resupply routes across the Atlantic.

Ethiopia

The Soviets have provided more than $4 billion in military hardware, together with substantial Soviet logistics and advisory support, enabling Ethiopia to develop the largest army in sub-Saharan Africa. Approximately 1,700 Soviet advisors assist the Ethiopian army.

Despite the large influx of Soviet assistance, the Marxist government has not secured the country. The areas of Eritrea and Tigray have anti-governmental insurgencies which have not been defeated either by the military or the government's starvation policies.

Famine has been severe, especially in these areas, but the resistance continues. Over 1 million Ethiopians have fled the country in the past several years.

Unlike Angola, no United States assistance is provided to the forces opposing the Marxist government on Ethiopia.

Other Involvement

The Soviets have provided lesser amounts of military assistance to Mozambique, Zambia, the Congo, Madagascar, and the Seychelles, although military advisors are stationed in a number of additional countries in Africa.

RELIGION IN THE U.S.S.R.

I. Overview

Background

Both the Helsinki Final Act and Madrid Concluding Document contain specific language guaranteeing freedom of religion. Principle VII of the final act pledges the participating States to "recognize and practice, alone or in community with others, his own conscience." The Madrid Concluding Document reaffirms this pledge and further pledges the participants to "favorably consider applications by religious communities of believers practicing or prepared to practice their faith within the constitutional framework of their states, to be granted the status provided for in their respective countries for religious faiths, institutions and organizations."

In addition to the passages of the Soviet Constitution referred to by Ambassador Schifter (cited above), the 1929 "Law on Religious Associations" requires that primary religious associations must register with local authorities. In practice, this allows the state to limit the number of religious associations, to reduce their number gradually, and even to deny legal status to an entire religious denomination. In short, the state can and does prevent Soviet citizens from practicing the faith of their choice.

"The Open Letter" reproduced in the Overview points out many, but certainly not all, of the specific ways in which the party can restrict religious activity. Essentially, the law is structured to prevent the clergy or hierarchy from exercising effective control over church affairs. At the same time, it allows state officials to manipulate church activities and policies. For the churches, it is a no-win situation.

Atheist Pressures Continue

The regime enforces its policy through the Council for Religious Affairs attached to the U.S.S.R. Council of Ministers. The Council monitors religious activities and is responsible for the enforcement of laws pertaining to religion. Its asministrative regulations thus impose an additional level of restrictions on religious liberty. According to official documents of the Council and unofficial reports reaching the West, the Council supervises religious activities and senior church officials in minute detail; censors religious publications; passes on personnel selections; and even monitors sermons and biblical passages used in religious services. Clergy cannot legally practice their calling without the Council's approval. Whenever possible, the Council places the clergy in the position of acting against their direct responsibilities by forcing them to implement policies designed to weaken and in time destroy religion: by closing churches "voluntarily," keeping silent when believers are harassed, and ignoring violations of law by the authorities. In general, the regime aims at compromising the integrity of clergy and religious institutions and at rendering organized religion and individual believers incapable of defending their interests.

Repression of Activists

Believers who refuse to register or comply with state controls become subject to a wide range of sanctions. Repeated violations of the Law on Religious Associations can lead to criminal charges. Articles of the (RSFSR) Criminal Code used against believers include those aimed specifically against religious activists as well as those used against political dissidents: Articles 142 (Violation of laws on separation of church and state and of church and school), 143 (Obstructing performance of religious rites), 227 (Infringement of person and rights of citizens under appearance of performing religious ceremonies), 190.1 (Slandering the Soviet state and system), or 70 (Anti-Soviet agitation and propaganda). In addition, articles involving general criminal violations are also used frequently, such as hoolinganism, engaging in prohibited trades, parasitism, and others.

One of the most excruciating, yet dominant, themes of Soviet persecution targets children. All possible efforts are made to prevent children being brought up in the faith of their family. Nonetheless, popular interest in religion has increased significantly during the past decade, according to authoritative official sources, unofficial reports, and knowledgeable foreign observers.

Religious Persecution in Eastern Europe and the Soviet Union

Lenin Writes the Rules

In 1903, V.I. Lenin wrote that "everyone must be free not only to belong to whatever religion he pleases, but *he must also be free to preach his religion and to change his religion.*"

Ten years later, Lenin was more candid: "Now, both in Europe and in Russia, *every* advocacy or justification of the idea of God, even the most subtle, even the best-intentioned, is a justification of reaction."

Once Communist "reaction" against any vestige of religion was ideologically justified, Lenin defined the role of the party (the vanguard of the proletariat) in the task of reacting to "bourgeois" religion. He did so in 1918, after the Communist Party had come to power in Russia: "The revolutionary dictatorship of the proletariat is power won and maintained by the violence of the proletariat against the bourgeoisie, power that is unrestricted by any laws."

Thus, by 1918, Lenin had laid the foundation for (1) the absolute necessity of persecuting religion, (2) the unlimited power available to the party in its efforts to exterminate religion, and (3) the desirability, when political circumstances require it, to camouflage the extermination program with rhetoric which appeals to Western values of free expression and free exercise of religion.

Only one issue remained in doubt: Are there any limits to the extermination campaign? Should it be limited to the churches? congregations? Bibles? eduction programs? Any combinations of these? Party members need not be burdened by such inquiries, Lenin explains:

> The fight against religion must not be limited nor reduced to abstract ideological preaching. This struggle must be linked up with the concrete practical call movement: Its aim must be to eliminate the social roots of religion.

So there are no limits on the Communist religious extermination program. The entire cultural basis of society is the enemy. Destruction must be total, so the means must be totalitarian.

The brutal history of Communist repression of religion in the following seventy years has never departed from this basic theme.

Background

Religious ideals have always posed a fatal threat to Communist ideology, and Communist governments have always strived to control and minimize the activities and influence of religious institutions within their borders. However, because of the different historical circumstances in each country in the Soviet bloc, governments there have resorted to various combinations of oppressive measures to eradicate religion's fundamental threat to their atheist doctrine.

Every country ever brought under Soviet domination continues to have a rich and diverse religious tradition, which Communist governments invariably attack, persecute, and subjugate, in order to inaugurate an official religion of materialistic atheism.

The method of Communist oppression is always guided by the party's assessment of what Lenin called "the correlation of forces," a concept which amounts to a carte blanche for any action, however oppressive and inhuman, designed to maintain power whatever the circumstances. Thus, in the confrontation between communism and religious groups behind the Iron Curtain, Leninist governments consider all religious moral systems to be unlawful competitors to the party's socialist morality. To a Communist government, pretending to represent the people, the church—*any* church—is, literally, Public Enemy No. 1.

[Ministers and priests are targets of persecution no matter what stage of "tightening" or "loosening" of restrictions a given country is experiencing. During the first eight years of the papacy of John Paul II, 19 priests (including one bishop), and a greater number of Protestant ministers, have been killed in circumstances either traced directly to the secret police, or universally acknowledged to be the work of that organ of terror. These cases represent only that small protion of the total which can be painstakingly documented in spite of the restrictions of a totalitarian society.]

Nor do Communists persecute only large communities. In the Soviet Union, for instance, the brave Baptists who refuse to register are a small sect, yet they are singled out for cruel treatment because of their principled resistance to State control. No group is too small to be oppressed, if by their example they offend the atheistic state.

Communist governments could not survive for long if their subjects were left free to choose between a tradition of religious morality and Lenin's ideology of sustained terror. Thus every Communist Party devotes massive resources to eradicating all the "bourgeois vestiges" of religion. However, because of the wid-ranging differences in circumstances among countries under Communist rule, the means employed to accomplish that final end vary widely.

In some Communist countries religion suffers under brutal and sustained terror so severe that it seems designed primarily to produce martyrs. Other Communist parties pursue their persecution of the church in more subtle ways, feigning "moderation" in order to curry favor with important sources of economic assistance from the West and to identify targets for later persecution. Some "human rights" policies designed to respond to such situations can actually reward such calculated swings between persecution and "glasnost," much to the sorrow of the persecuted communities.

Indpendent Baptist Pastor Georgi P. Vins, an unusually brave man who was imprisoned for many years in the Soviet Union for his religious beliefs, now produces the Prisoner Bulletin, an authoritative chronicle of Soviet repression of religion. In a recent article, "Glasnost: What does it mean for Christians?" Pastor Vins comments on the periodic "loosening" of Soviet religious repression:

> A look at the past can put today's events in perspective. In 1965, when Leonid Brezhnev became the leader of the Communist Party of the Soviet Union, large numbers of Christian prisoners were unconditionally released from prison and labor camps. More importantly, they were rehabilitated, which means they were officially declared to be innocent of any crime or wrongdoing. But just 1 year later, in 1966, almost all of them were again arrested, along with many other believers. The same thing had happened after the death of Stalin. In 1955–56, large numbers of Christian prisoners were released.

But within 2 or 3 years, many were arrested again and sent back to prisons and camps.

To understand the extent of repression of religious believers in the Soviet Union, one must recognize the massive task which faced Alexandr Solzhenitsyn when he tried to chronicle the horrors of the prison camps in the "Gulag Archipelago." This work constitutes a monument to the combination of exhaustive research and a masterful sense of history.

Few people today possess that talent, and the closed Soviet system makes it all the more difficult to get valid information on the subject. Hundreds of independent churches, researchers, ethnic and religious organizations, and governmental agencies around the world have made efforts to gather and organize information on Soviet repression. Yet all discussions of the subject must be preceded by the observation that, for each case of suffering, imprisonment, torture, and murder that can be accounted for, there are countless others about which we have no information.

Thus the effort in the West to bring aid to persecuted believers behind the Iron Curtain is first and foremost based on prayer and a sense of solidarity, rather than facts which can be proven in a court of law. In such affairs the Soviets rarely subject themselves to a court which might rule against them, and all too often Western governments are all too eager to believe a friendly Soviet figure promising reforms and forget the suffering of the forgotten ones. In the view of many of those believers who have fled to the West, the sense of desolation brought on by the cooperation of Western powers with their Soviet oppressors is the heaviest burden of their persecution.

Legal Issues

Given the rich fabric of diversity of the peoples subjected by the Soviet Empire, the possibilities for oppression are legion. Ambassador Richard Schifter, U.S. Assistant Secretary for Human Rights and Humanitarian Affairs, identifies four key provisions of the Soviet constitution which reflect the nature of the Soviet system, and which form the basis for the systematic repression of believers there:

—The leading and guiding forms of Soviet society and the nucleus of its political system, of all state organizations and public organizations, is the Communist Party of the Soviet Union * * * The Communist Party determine * * * the course of the domestic and foreign policy of the U.S.S.R., directs the great constructive work of the Soviet people, and imparts a planned, systematic, and theoretically substantiated character to their struggle for the victory of communism. [Article 6]

—The Soviet state is organized and functions on the principle of democratic centralism * * * Democratic centralism combines central leadership with local initiative and creative activity* * * [Article 3]

—Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interest of society or the state * * * [Article 39]

—Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations * * * [Article 59]

—Citizens of the U.S.S.R. are obliged to observe the Constitution of the U.S.S.R. and Soviet laws, comply with the standards of Soviet conduct, and uphold the honor and dignity of Soviet citizenship * * * [Article 59]

Ambassador Schifter points to the above provisions when he explains why the Soviets so painlessly ignore the content of an often-cited constitutional guarantee of freedom of religion in the Soviet Union:

> Citizens of the U.S.S.R. are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. [Article 52]

The conflict comes when the believer is confronted with article 227 of the Criminal Code of the Russian Federated Soviet Socialist Republic, or the corresponding section of the criminal code of any communist country, which makes it a crime to participate in a group which "under the guise of preaching religious doctrine and performing religious rituals is connected with * * * inciting citizens to refuse to do social activity or to fulfill obligations." The penalty imposed on violators of this section is normally 3 years, for leaders 5 years.

Of course, legal texts cannot protect a subject of a Communist government if the party does not want them to. Nonetheless, many believers in the Soviet bloc, recognizing the importance to "world opinion" of the rule of law, attempt to remedy the Communist oppression of religion legally. On September 11, 1987, a group of 38 believers petitioned Party Secretary Gorbachev to implement the legal changes which would make freedom of religion and freedom of conscience a reality of Soviet life.

This letter is notable not only because of the bravery of its authors, but also because it provides a concise comprehensive checklist of the dozens of means of religious repression available to any Communist government. All the repressions of religion experienced in the countries of the Soviet bloc which will be discussed in the following sections represent variations of the themes articulated in this letter.

SUMMARY OF OPEN LETTER REGARDING NECESSARY CHANGES IN LEGISLATION ON RELIGION

[Published in *Novoe russkoe slovo* (New York), October 11, 1987]

The 30 signers of this open letter begin by saying that, in a period of restructuring of Soviet society, the time has come to examine the position of the Christian Church in the Soviet past and present. They claim that at the present time, for legal reasons, the church is effectively denied an active role in national life. This is especially true since the Communist Party of the U.S.S.R. is officially an atheistic body. They suggest 11 specific changes, and mention that these have been developed in accordance with agreed-upon international standards and agreements such as the Helsinki final accords. They also insist that any new legislation consider religion not a psychiatric condition requiring hospitalization—a procedure much abused in the past when believers were interned in psychiatric hospitals for their religious belief.

1. To grant the church and religious organizations the status of legal entities.

2. To change the decree on the nationalization of church property. They mention that property such as buildings icons, relics, etc., should be returned to the church.

3. To change Article 52 of the U.S.S.R Constitution to permit both antireligious as well as religious propaganda, both religious and antireligious organizations.

4. To change the regulation of April 8, 1929, that forbids charitable work by churches and religious groups. The authors mention that churches should have the right to conduct charitable work among the needy and that clergy should have the right to visit the sick in hospitals, and prisoners. Further, they say that believers in penal institutions should have the right to wear religious medals and have access to religious literature.

5. To give churches complete freedom to preach and provide religious instruction. To permit churches to use the mass media and to be able to freely publish religious works. To permit the establishment of independent religious printing and publishing houses, and of open, freely accessible public libraries containing religious literature.

6. To permit religious education, and the establishment of Sunday schools and other religious educational bodies for children. They note that all Christians, including children should have the right not to go to work or school on major religious holidays.

7. To grant churches and religious bodies the rights enjoyed by other organizations in the U.S.S.R.—to be represented in regional and national governments, to own property. To permit broader participation by religious bodies in national life.

8. To review the autonomy enjoyed by religious bodies and guarantee freedom from government interference in internal church affairs. To protect the churches from discriminatory taxation policies and laws.

9. To not prevent the development of relations and contacts with international church bodies or individual believers outside the U.S.S.R. To permit pilgrimages to holy places located outside the U.S.S.R. and permit emigration from the U.S.S.R. for reasons of religious belief and conviction.

10. To permit alternatives to military service for conscientious objectors, for those religions in the U.S.S.R. that oppose bearing arms.

11. To permit the activity of biblical societies in the U.S.S.R.

The writers conclude by stating that "we assume that our proposals will be attentively examined by you, and that we will receive an answer to them within the time period established by law."

II. 1987 Year-End Survey on Soviet Jewry After the Washington Summit

From the National Conference on Soviet Jewry

(Submitted to Secretary of State George P. Shultz, January 6, 1988)

1987 was a year of change in United States-Soviet relations, as well as in the status of Soviet Jewry. During 1987, 8,155 Jews emigrated from the Soviet Union—substantially higher than the 914 Jews permitted to leave in 1986, but still far less than the 51,320 Jews who left n 1979 (see attached chart). The past year also saw the release of the last Jewish prisoner of conscience, Aleksey Magarik, although thousands of refuseniks were still waiting for their release from the Soviet Union, and many for more than 10 years. The first kosher takeout restaurant was opened in Moscow, and the first officially sanctioned Hebrew courses were approved in Baku, in the Soviet Republic of Azerbaijan. But these developments were tempered by the continued refusal of authorities in Moscow and other major Jewish centers to permit the legal registration of Hebrew lessons or study sessions on Jewish history and culture.

Some analysts saw the overall picture for Soviet Jews improving somewhat, as demonstrated in the increase in emigration and the decrease in the prosecution of refuseniks. For the first time in the Soviet Union, "regimeniks"—those refuseniks denied visas on grounds of knowledge of "state secrets," held an unofficial symposium in Moscow to draw attention to their plight. The KGB did not try to prevent the symposium, nor did they attempt to prevent the participants or Western media from attending.

KGB Thwarts Demonstrations

The signs of "permissiveness," however, stood in stunning contrast to the disruption of a demonstration by refuseniks in Moscow on the eve of the December United States-Soviet Summit meeting in Washington, where hundreds of KGB plainclothesmen overwhelmed the few dozen peaceful protesters, pushing and shoving them off the triangular park at Smolensky Square. That same day, nearly a quarter of a million people marched and peacefully assembled on Freedom Sunday, in Washington, in support of Soviet Jews. Many of the speakers at the rally later on the mall denounced the crackdown in Moscow, which was widely covered in the Wesern media.

While a number of the Moscow demonstrators were detained for several hours and released, Jews in Leningrad were prevented from participation in a planned demonstration in that city. Among them were refuseniks who gathered in the apartment of Arnold Shpeizman, and were put under house arrest. Other prominent refuseniks, Lev and Marina Furman, did manage to reach the demonstration site but were immediately arrested and taken to court where Lev was sentenced to ten days' detention and Marina fined 50 rubles.

Just 2 weeks before the Summit, the KGB broke up another demonstration in Moscow outside the All Union OVIR (visa office). In addition to fines of up to 50 rubles several refuseniks were jailed including Leonid Travinsky (5 days), Mark Kagan of Minsk (10 days), and Valery Federov (10 days), Yuri Goldin (15 days), and Igor Chernoshavartz (10 days), all of Leningrad.

Freedom Sunday Rally Makes Its Point

Without a doubt, Freedom Sunday for Soviet Jews was the most remarkable outpouring this country had ever witnessed on behalf of a Jewish issue. People came from all over the United States and Canada, on the eve of the summit, to proclaim their support for the rights of minority, in a distant land, struggling for freedom and their basic human rights.

The rally had a tremendous impact on several groups including: (a) refuseniks in the U.S.S.R. who were able to hear the demonstration broadcast live on the Voice of America, which is no longer jammed; (b) people who attend the rally and have not previously been involved in Jewish concerns; (c) U.S. officials whose commitment to free Jewish emigration was reinforced by the showing of popular support; and (d) Soviet officials who both privately and publicly noted that the American people have "made their views known."

Some Positive Shifts in Emigration

While Mikhail Gorbechev was obdurate on the possibility of any major changes in the overall human rights issue, some modest, but positive shifts affecting emigration were discerned, perhaps in conjunction with the summit. There is some easing of the first-degree family restriction as a requirement for invitations to leave. Indeed, in some cities, from 25 to 30 percent of new applicants receiving permission did not have such invitations. There are signs of flexibility in the application of "regime considerations" or "state secrets" for many applicants, even though hundreds of long-term refusenik families are still in that category.

Last February, the Moscow OVIR released a statement published in a local newspaper, Vechernaya Moskva, listing eight long-term refuseniks who have consistently been refused exit visas on state security grounds, and implied they would never leave. Three of the eight, including Vladimer Slepak, received permission to leave just before the Summit, while Alexander Lerner received permission after the Washington event. This demonstrated that secrecy refusals were still being used as a mere pretext to restrict emigration in general. One U.S. official expressed his hope that Moscow will continue to cut back on the use of "state secrets" as a barrier to emigration in the future.

There was additional speculation that the barrier of so-called "family obligations" might be subject to review. Just as the authorities let out a number of long-term refuseniks to placate American public opinion before the Summit, there is some indication that OVIR may loosen the requirement that family members remaining behind must give permission to their relatives who wish to leave the Soviet Union.

Finally, although there were very few new applicants in the beginning of the year, in part because of the restrictive provisions of a new law on entry and exit which became effective January 1, 1987, there has since been a dramatic increase in the number of letters of invitation requested by Soviet Jews from relatives in Israel as well as in the United States. This was most evident in the weeks prior to and after the Summit, possibly reflecting the more relaxed atmosphere between the superpowers, as well as the encouragement generated by the increase in permissions in the prior six months.

Most observers agreed, however, that the next few months are critical in measuring whether these anticipated modifications in Soviet visa policies are genuine moves by the authorities, or perhaps just gestures designed to mollify a hostile Senate into ratifying the INF Treaty, which was signed on the first day of the Summit meeting.

Still, one must conclude that even with the modest increases in exit visas, "the emigration law and practices of the Soviet Union," according to a report recently conducted by the international law firm of White & Case, "are outside what may be safely regarded as the common core on which civilized nations agree and the common ground that has emerged under international law." Especially as regards state security restrictions, the report finds that the Soviet Union is alone among major developed nations in routinely concluding that ordinary citizens possess "state secrets" to justify preventing their leaving the country.

Cultural, Religious and Tourism Developments

On cultural and religious issues, the kosher take-out kitchen at the main Moscow Synagogue recently became operational, as has an unofficial Jewish library set up in the Moscow apartment of Yuri Sokol. With the exception of the Hebrew classes in Baku, the teaching of Hebrew remained proscribed, as did the dissemination of Jewish cultural and religious materials in the Russian language, which is the only language spoken by the overwhelming majority of Soviet Jews.

In addition, while the Soviet Union has halted jamming of the BBC, the VOA, Vatican Radio and Radio France, *Kol Israel* (Israel Radio) is still being jammed, preventing Soviet Jews from receiving information concerning Israel. Similarly, Soviet authorities confiscated at least twenty titles and impounded 2,000 posters from the Israeli booth at the Sixth Annual Moscow International Book Fair. The September 11 issue of *Komsomolskaya Pravda* attacked the organizers of Israel's booth for alleged "unprincipled use of the facilities to disseminate their propaganda."

Surprisingly, tourism between Israel and the Soviet Union increased, with individual Soviet Jews visiting relatives in Israel and vice versa. The Israeli paper *Maariv* quoted reports from Moscow saying that an announcement was posted on the doors of the Moscow OVIR stating that "Those wishing to visit Israel may now apply to do so." Temporary visits between the Soviet Union and the United States have similarly increased. There were no reports, though, of refuseniks granted tourist visas to Israel or anywhere else.

Officially sponsored anti-Semitism, in the form of anti-Zionism, also diminished somewhat in the Soviet media. There were press reports suggesting the possibility that the Anti-Zionist Committee of the Soviet Public might be disbanded. Officials of the Committee have been strong advocates against Jewish emigration from the Soviet Union and have conducted a vitriolic propaganda campaign against "international Zionism." While the Soviet government has not been overtly critical of the nationalist and anti-Semitic group, Pamyat, the December 22 issue of the Communist Party newspaper, *Pravda,* warned that illegal demonstrations and unofficial organizations espousing "chauvinistic, anti-Semitic and Zionist" views would not be tolerated. The reference to Zionism has continued to appear over the years, alongside other expressions of "chauvinism," and has been used as a continuing attack on individuals and organizations pressing for Jewish emigration.

These limited developments might signal a real Soviet policy modification, or may be merely a shift in tactics designed to diminish the sense of isolation and deprivation felt by Soviet Jews. At the moment, though, it is clear that *glasnost* has not brought an end to the restrictions on the Jewish emigration and cultural movements in the Soviet Union. At best, despite some positive and welcome changes, the measures taken in 1987 serve to highlight the fundamental problems which Soviet Jews continue to face.

SOVIET JEWRY RESEARCH BUREAU—JEWISH EMIGRATION FROM THE U.S.S.R. STATISTICS

Oct. 1968-1970	4,235	1977	16,736
1971	13,022	1978	28,864
1972	31,681	1979	51,320
1973	34,733	1980	21,471
1974	20,628	1981	9,447
1975	13,221	1982	2,688
1976	14,261	1983	1,314

	1984	1985	1986	1987	Total
Jan.	88	61	79	98	98
Feb.	90	88	84	146	244
Mar.	51	98	47	470	714
Apr.	74	166	72	717	1,431
May	109	51	49	877	2,308
Jun.	72	36	55	796	3,104
Jul.	85	174	31	819	3,923
Aug.	83	29	88	787	4,710
Sep.	69	93	126	724	5,434
Oct.	29	124	104	912	6,346
Nov.	55	128	102	910	7,256
Dec.	91	92	77	899	8,155
	896	1,140	914	8,155	

From October 1986–December 1987, 274,726 persons left the Soviet Union with Israeli visas. Approximately 165,817 of them went to Israel.

III. What Should U.S. Policy Goals Be?

In questions of human rights, the Soviets have consistently adopted an attitude of cynicism very similar to the callousness they have displayed in arms control verification matters. This approach was reflected in their murder of U.S. observer Major Arthur D. Nicholson in East Germany on March 24, 1985. They have never apologized to the family of Major Nicholson, much less the Government of the United States, for the 1985 incident. Nor have they abated their fundamental and abiding war against religion behind the Iron Curtain.

Their hostility towards the very mentioning of religious rights recently emerged when Senator Pat Moynihan referred to the beleaguered Ukrainian Catholic Church during a live television hookup with Moscow last October. *Izvestiya* printed a scorching response to the Senator which branded the Ukrainian Church "a foreign clerical grouping made up of emegres from the Ukraine," accusing them of "collaborating with the Hitlerite occupiers" during World War II. As far as the Soviet Union is concerned, the Ukrainian Catholic Church "voluntarily" joined the Russian Orthodox Church in 1946, and no longer exists.

Such instances of Soviet intransigence on religious questions abound. This stance is not a temporary attitude, susceptible to alteration by sweet-talking emissaries, but a deeply-rooted policy stance based on an ideological assessment of the correlation of forces in the world. Clearly, the Soviets will not address this issue on its own merits. It must be linked to something they want even more. Any counsel against such linkage amounts to a virtual condemnation of the religious believers in the Soviet Union to unending persecution, with the seal of approval of the United States and the West.

At the present moment, only the United States can present the Soviets with the circumstances that would invite a fundamental change in religious policy. And it can do so through the opportunity presented by consideration of this treaty.

The present opportunity also brings to light a different, but equally fundamental problem: our human rights concerns are normally expressed in a desultory fashion, and are sullied by the widely recognized opposition even within the State Department to the very notion of human rights "linkage" to matters of "real importance," such as arms control. Thus the Soviets assume they can tell us one thing and do another, not only because they have been successfully doing it for years, but also because western advocates of the matters of "real importance" will conduct their apologetics for them. Only when the Soviets stand to lose an attractive concession—trade, for instance, or international financial support, or a major strategic concession from the West—are they willing to countenance the pleas of human rights advocates worldwide. Even on these occasions, the Soviets have been willing to address only those cases which do not deeply affect the ongoing realities of Soviet life.

For instance, U.S. policy focus on the emigration of believers represents a worthy concern, but is nonetheless a peripheral issue to the Party and to the tens of millions of believers who do not wish to emigrate, or have no hopes of ever doing so.

In the past, U.S. policy has met with some success in securing the rights of emigration referred to in the Helsinki Accords, and on freeing those who have been imprisoned for their religious beliefs. However, if these issues remain the focus of U.S. concerns as we move into a new era of relations, the Soviet Union might well decide to meet our criticism head-on, releasing and immediately expelling the prisoners known by the West to be incarcerated for their religious beliefs (between two and three hundred), thus ridding themselves of many of the Christian and Jewish figures they find most troublesome. Not only would such an action leave the oppressed religious communities deprived of the companionship and leadership of those expelled, it would also deprive the United States of a worthy issue and force us to find a new vehicle on which to pin our hopes for further reforms.

All the while, with a focus strictly limited to emigration, nothing would come to pass within the Soviet bloc which might improve the lot of the millions of believers of all faiths behind the Iron Curtain who are routinely denied even the basic elements of religious freedom. The focus of United States policy must now be brought to bear on those realities in Soviet practice: any policy measures adopted must be designed not only to help victims of religious oppression *leave,* but to be able to *stay* in their homeland and exercise their fundamental right to worship in the way they choose.

Albania

Albania does not lie within the dominion of the Soviet Union, either geographically or politically. Nonetheless, until his death in 1985, Albanian Communist Party chief Enver Hoxha was Europe's last surviving dictator from the Stalinist era. The total war on religion he waged for forty years is a textbook example of Lenin's maxims finding their consequences in the deeds of a Stalinist practitioner.

Today, the totality of religious repression in Albania sets a standard which other Communist countries can only envy; none have managed to emulate it. Yet contemporary Albania represents the fundamental dilemma confronting the Leninists: on the one hand, it represents the best model to date of the implementation of Lenin's program to annihilate religion; on the other, it is the home of Mother Theresa.

In 1982, Hoxha bragged to a European visitor that Albania "Had killed all the priests and the whores." For Hoxha, this was no idle boast. In the same conversation he also claimed that he had found it necessary to murder his own Prime Minister, Mehmet Shehu, at the dinner table in December 1981 because he could trust no one else to do it.

This account of Hoxha's ruthlessness reflects the tenor of Albania's overall approach to the extermination of religion: it is thorough, brutal, and unforgiving. Hoxha took power in 1944, and, by 1950, had killed all but one of the Catholic bishops in Albania. The Orthodox fared as badly. During the same period, two Orthodox Archbishops and three bishops were executed, some after lengthy torture.

Unfortunately, little accurate information escapes official censorship in Albania. Nonetheless we know that by 1975 the entire hierarchy and most of the clergy of the Orthodox Church were in prison. Of the three Catholic bishops alive in the 1970's, two died in captivity (one after torture), and the third, Nokill Troshani, is presumed still to be alive. Albania's Communist rulers have succeeded more than any other Party in making their country safe for atheism.

The Baltic States

Estonia, Latvia, and Lithuania were forcibly annexed to the Soviet Union in 1940. In addition to the suppression of religion in these countries, the Soviet Union is also conducting "a systematic program of 'Russification' in the Baltic States by continuing resettlement there of a greater percentage of Russians relative to the native Estonian, Latvian, and Lithuanian populations," according to the State Department. In Estonia alone, which has a population of little over one million, there are 150,000 Soviet troops stationed, more than in Afghanistan.

The churches of the Baltic States—primarily Lutheran in Estonia and Latvia, and Catholic in Lithuania—have been targets of unbridled persecution by the Soviets since 1940. Early on, many of the clergy and church leaders were imprisoned, killed, or exiled. Since then, Soviet law has been excrutiatingly applied: no Bible groups, prayer circles, youth (or adult) organizations, or works of charity are permitted. All reading material must be approved by the state, which controls all forms of worship.

The most invidious of the state sanctions against religion involves the proscription on the teaching of the young. In 1985, 127 Lithuanian priests wrote to Secretary Gorbachev and charged the Soviet regime with failure to comply with Lithuanian law, the Soviet Constitution, Article 18 of the Universal Declaration of Human Rights, and Section VII of the Helsinki Final Act. Most importantly, the priests "specifically criticized Soviet actions which 'morally terrorized' children of religious parents for attending church, suppressed church rites and religious education, controlled the appointment of priests and bishops, and prosecuted activist priests and believers."

Thoughout the Baltic States, the Soviets are turning to a new method of dealing with religious believers: they are forced to "emigrate" to the West. This practice is deplored by believers who recognize that the Soviets are taking away popular shepherds from the faithful, while receiving the acclaim of "world opinion" for the "release" of these figures. Once those leaders are gone, the Soviets often appoint successors, like Archbishop Eriks Mesters of Latvia. After accompanying Secretary Gorbachev to Washington on Dec. 8, Archbishop Mesters gave a Christmas sermon in Riga, Latvia, in which he praised Gorbachev as an "angel of light" and the "new messiah." The United States, the "force of darkness," had been conquered by Gorbachev, the Archbishop preached, because he had forced the United States to sign the new [INF] arms control treaty. It is no wonder that most Latvian clergymen objected when the Soviets picked Archbishop Mesters to succeed the deceased Archbishop Matulis in 1987.

Religious persecution in the Baltic States is often joined to the general program of genocide involved in the "Russification" program outlined above. During the Chernobyl disaster aftermath, hundreds of Estonian workers were conscripted, transported to Chernobyl, and made to clean up the radioactive site with no more protection than paper masks and white jackets. Forced to live in tents, and to stay for several "tours of duty," many have returned home now to find they manifest all the classic signs of radiation poisoning.

Bulgaria

Religious activity in Bulgaria is the lowest of any Warsaw Pact country, but that has not satisfied Communist Party boss Todor Zhivkov, the longest-reigning ruler in the Communist bloc (he came to power in 1972). Persecution of the Church in Bulgaria has been total: restrictions on all aspects of religious life are so severe, with opportunities for families to instruct their children in the Faith so limited, that most church life has been stifled.

Since 1972, Zhivkov has tried to use the Church, especially the majority Orthodox Church, to further the Bulgarian party's aims at home and abroad. Even though the Orthodox Church tries to cooperate with the regime, several hundred Orthodox clergymen have been imprisoned, tortured, or killed for practicing their faith beyond the narrow bounds permitted by the Party, which interprets all legal provisions, including the meaningless constitutional guarantees of freedom of religion.

Other denominations—Catholics, Protestants, a small number of Jews, and over a million Islamic Bulgarians and Turks—have received even harsher treatment than the Orthodox. Because of the involvement of the Bulgarian secret police in the attempt on the life of John Paul II in 1981, the government clamped down mercilessly on Bulgarian Catholics, in response to the worldwide outcry against Bulgaria following that event.

Bulgarian Protestants number some 20,000, and the Jewish population numbers some 5,000, down from over 50,000 during World War II, when pre-Communist Bulgaria served as a haven for many of them. Today Sofia's only synagogue is run-down and frequented by only a handful of worshippers.

The largest religious group besides the Orthodox includes over a million Bulgarian and Turkish Moslems. Because the regime considers the Islamic faith more deeply-rooted than Christianity, pervading all facets of life, the persecution of Moslems surpasses that of any Christian sect. Bulgarians of Turkish descent are forced to change their names to acceptable Bulgarian forms, and are fined if they speak Turkish anywhere outside the home. Virtually no Islamic practices, from the pilgrimage to Mecca to simple burial rites, are permitted.

Czechoslovakia

Czechoslovakia has a cultural heritage quite distinct from most other countries in the Soviet bloc. It is primarily Catholic, like Poland and Hungary, but it was the most westernized of the European nations occupied by the Soviets after World War II. [In fact, the first German university was not in Berlin or Vienna, but in Prague.] Czechoslovakia's advanced state of development and culture at the time of its subjection to Communist rule invited a combination of the methods of repression different from those implemented elsewhere in the Soviet Empire, but the underlying theme was, and remains, the same: complete control of religion, co-opting religious groups where possible, and debilitation (with an eye towards eventual annihilation) of those groups which do not succumb to state control.

Czechoslovakia's religious repression reflects the profound impact of the "Prague Spring" of 1968, when Alexander Dubcek, the Communist Party leader at the time, introduced liberalization which eventually resulted in the invasion of the country by Soviet troops. Since then the Party has aimed at nothing less than control of every aspect of political, social, economic, and cultural life. During the twenty years before Dubcek's fall, oppression of religion had already reached totalitarian levels, so the pattern for total control had already been established.

The 1977 proclamation of "Charter 77," a document designed to challenge the Communist Government to abide by the agreements signed in Helsinki in 1975, resulted in even more oppression. But it also introduced a new sense of bravery into the religious faithful, who realized that the Church might die or go completely underground if the government repression continued unabated. The Chartist movement allowed an alliance to form among many groups suffering human rights violations by the government, and was further emboldened by the election of Pope John Paul II. Even though the Catholic hierarchy had been brutalized earlier in the 1970's Cardinal Tomasek, inspired by John Paul II, became much more vocal in condemning the abuses of the government after 1978.

Nonetheless, the Catholic Church (with 10 of Czechoslovakia's 15 million population as believers) suffers great persecution in Czechoslovakia. Protestant and Evangelical sects, far fewer in number than the Catholics, also suffer so much that many have gone underground, thus posing a special challenge to the government: the very existence of these illegal communities defines the government's claim to absolute control of religious affairs.

The Communist Party in Czechoslovakia has tried every possible means of repressing religion and has failed. Even the crude attempt to start an "enlightened," pro-government Church group called "Pacem In Terris" ("Peace on Earth," after a famous encyclical written by Pope John XXIII) failed miserably. In Czechoslovakia, each attempt to persecute religion has brought it new vigor.

East Germany

The Communist regime in East Germany is renowned the world over for its expertise in efficient repression. According to the State Department's *Country Reports on Human Rights Practices for 1986,* "the G.D.R. continues to restrict the fundamental freedoms of thought, speech, religion, assembly, and travel. A large secret police apparatus, which is supplemented by informers, opens mail, installs listening devices, places people under surveillance, subjects them to interrogation and intimidation, and arrests them without due process."

East Germany is the only predominantly Protestant country in Eastern Europe, and its government promotes official atheism more assiduously than any other Soviet bloc country. The level of general oppression is so great that it is difficult to discern an even greater level of religious persecution, but it exists. The Lutheran Church comprises some 25% of East Germany's 16.2 million people, and all believers are subject to pervasive discrimination with regard to education, work, housing, and other basic circumstances of dairy life. This program is very effective at intimidating young people from association with a religious group. In fact, the April 1985 Synod in East Berlin complained that members of the secret police were taking children out of their homes and promising them coveted university educations in exchange for information on the religious involvements of their families.

East German churches can and do accept financial help, within limits, from churches in West Germany. For the Communist Government, this provides much-needed hard currency, obtained by the government in exchange for local currency given the churches for their works of the social apostolate. Thus the churches are allowed some freedom in the area of social service, as well as in ecclesiastical appointments and educational matters, but the government insists that no religious activity be conducted outside the official government church-related agencies. The programs of surveillance and intimidation effectively serve that end, and there is precious little free religious activity in East Germany of any kind.

Hungary

Religion in Hungary still reverberates with the lessons of the revolution of 1956, when the United States remained aloof during the Hungarians' uprising against Communist rule. When the Soviets were assured that no western intervention would impede their reaction, 200,000 Soviet troops rolled into Budapest with tanks and armored cars, inaugurating a chilling wave of repression. To this day, Hungarian religious life has not recovered from the suffering inflicted by the Soviets and the Communist Party in the wake of the 1956 uprising.

Following Soviet domination of Hungary at the end of World War II, the Communists zeroed in on the churches as the focus of Hungarian tradition and nationalism. Their primary target was Cardinal Jozef Mindszenty, the Primate of Hungary, who was subjected to torture and sent to prison after a show trial in 1948. In the following years, most religious orders were suppressed, half the nation's churches were taken over, and hundreds of clergymen were jailed.

The Hungarian people exhibited great bravery when they became the first country to revolt against Communist suppression in 1956. After this failed, however, and with Cardinal Mindszenty effectively silenced in his asylum in the American Embassy in Budapest, the Hungarian Church was significantly weakened by government repression. A vast network of secret police, collaborators, and surveillance was inflicted on the Church, and internal conflicts were created or exacerbated by the State to weaken it. By 1976, Vienna's Cardinal Koenig bemoaned the situation in the Hungarian Church: "Feelings of doubt, anguish, disappointment, and despair fill the hearts of the faithful, especially in the cities."

Catholics constitute some 60% of Hungary's population, but only about a quarter of them are active. The next largest church, the Reformed Church, represents some 18% of the country's 10.5 million inhabitants. The State Church Office oversees every aspect of Reformed Church life, as it does the Catholic Church. Unlike other Soviet-dominated countries, however, the activities of smaller sects are allowed to proceed without major disruption. The regime even recognizes the claims of "conscientous objectors" from these sects, but has recently indicated a fear that Catholics might begin to claim the same tenet of faith *en masse* to protest the harsh draft laws, often used to discipline religious "offenders."

Hungary's condition today indeed reflects Cardinal Koenig's view voiced in 1976. The experience of 1956, where western inaction provided a tacit seal of approval for the brutal Soviet invasion of Hungary, has left an indelible impression on the Hungarian people. Today Hungary has the lowest birth rate and the highest suicide rate in the world. Hungarian society has paid a stiff price for the Communist war against religion.

Poland

The Solidarity movement in Poland represents all that Communism has tried to exterminate in every country it has ever conquered. In Solidarity are bound up the spiritual, historical, and social realities that collide head-on with the notion of the "new socialist man," the atheist ideal embodied in the constitution of every Communist country.

Solidarity was founded by Polish workers in August 1980, when they put pictures of John Paul II and the Madonna on the gates of the Gdansk shipyards and demanded the dignity of the workers so persuasively articulated by Pope John Paul. In confrontations with the Jaruzelski government, Solidarity, the Church, and the Polish people are one. A tremendous faith and tradition provide the resilient strength demonstrated in Poland during the past ten years, and it is clear that, as far as Jaruzelski is concerned, when the Communist government persecutes Solidarity, it persecutes the Church.

The imposition of martial law on December 13, 1981 made Solidarity illegal, but those leaders who were not imprisoned immediately went underground. Unable to find those who were in hiding, the Jaruzelski secret police constantly harrassed, and frequently brutalized, priests who were sympathetic to Solidarity. Bishop Kazimierz Kluz and Father Honoriusz Lowalczyk were killed in 1982 and 1983, respectively, under circumstances which point to the involvement of the secret police. Many other priests were beaten, and hundreds have been threatened, for their support of Solidarity.

The most flagrant murder of a priest gained international attention when Father Jerzy Popieluszko was tortured and murdered by four state security officers for his unswerving support of Solidarity members' religious and human rights. After this murder, the outcry against the regime so intimidated Jaruzelski that he found it necessary to bring some members of the secret police to trial. Four lower-level officials were eventually given long sentences.

Unfortunately, U.S. policy at the time of Father Popieluszko's murder was so intent on the normalization of relations with Jaruzelski that the U.S. proceeded to withdraw its objections to Poland's entry in the International Monetary Fund less than two months after Father Jerzy was killed. Jaruzelski's response was predictable: in December 1987, the Communist government, exhibiting the callous cynicism it has always harbored for Solidarity, included all four of those sentenced for Father Popieluszko's murder in an amnesty that was originally designed to apply to those guilty of the political "crime" of being active in Solidarity.

1988 will be a critical year for Poland. On the one hand, the United States has given the Jaruzelski government a firm vote of support, removing all the sanctions imposed after the 1981 martial law (in spite of Jaruzelski's refusal to restore Solidarity's legal status) and allowing the restoration of full diplomatic relations at the ambassadorial level. The Polish people, on the other hand, have abiding reservations. According to the *Washington Post* of January 7, 1988, an authoritative survey in Poland "found that 80 percent of Poles have entirely negative opinions about the current government and 60 percent think there are reasons for 'a serious explosion [and] open social conflict' in Poland this year."

Romania

Romania suffers one of the most brutal dictatorships in the Soviet bloc, and the religious communities have not been spared. Communist Party Chief Nicolae Ceausescu employs a combination of repression at home and diplomatic overtures abroad to strengthen his hold on all aspects of Romanian life. While the Orthodox Church is very active, and Romania has the largest and fastest-growing Baptist population in all of Europe, Romanian believers have to brave a broad network of hatred, manipulation and repression in order to practice their faith.

Romania and Ceausescu represent the Communist bloc's most adroit attempt to orchestrate international human rights concerns for the benefit of a Communist government. Romania's "independence" from the U.S.S.R. is the basis for its Most-Favored Nation (MFN) status, and Ceausescu has learned the value of manipulating political prisoners in international diplomacy, first imprisoning them, then disclosing their existence, and then bargaining with them for future economic benefits.

Romania's Orthodox Church, which represents 80% of the population, and 13 other religious bodies are officially recognized, and closely regulated by the Department of Cults. Catholics, the Lord's Army, and some small Protestant and Orthodox groups are not recognized, however, and are severely persecuted because of their lack of legal status. Those who survived the prisons during the post-war period, like the Reverend Richard Wurmbrand, a valiant Lutheran pastor, brought testimony to the world that Romania's prisons for Christians were probably the worst in Eastern Europe.

The repression in Romania today carries on this tradition of thoroughgoing persecution. In spite of government denials, first-hand witnesses have attested to the systematic destruction of churches and synagogues throughout Romania. At one point, the government siezed "illegal" Bibles (virtually none are allowed) and reprocessed them into toilet paper. Nonetheless, believers in Romania manifest a strong and growing faith. The Baptist churches are growing at a rate of 13% a year, and persecution seems to encourage even greater bravery.

Yugoslavia

Yugoslavia enjoys a unique position in the Moscow-aligned Soviet bloc, since it is not a member of the Warsaw Pact. Nonetheless, its

Communist government espouses atheism and incarcerates a surprising number of political prisoners, given its low-key approach to religious repression there.

Yugoslavia's variegated religious character is inseparable from the many nationalities which co-exist so uncomfortably within its relatively arbitrary borders. In addition to the many Christian denominations and ethnic populations within the country, the Islamic population (18%) has recently enjoyed a rise in religious activity and influence, since many of Yugoslavia's indispensable supporters on the international scene are from the Islamic world.

Yugoslavia's history under Communism was begun quite ruthlessly under Tito, whose "independence" from Moscow made his brutality more palatable to some western observers. While Tito never attempted to liquidate religion, his approach was equally repressive, but less predictable, than repression elsewhere in the Soviet bloc. Orthodox believers suffered greatly during the war, and have not yet recovered from the impact of hundreds of thousands of deaths during that time.

Tito's rule in Yugoslavia was autocratic, based on his belief (shared by many observers at the time) that the six independent republics would split asunder without a strong, charismatic central leader. Since his death in 1980, the fear of the anticipated breakup has combined with economically depressed conditions to motivate Party leaders to crack down on religion in unpredictble, often capricious ways. Show trials are often used by the Party to discourage religious "excesses," and the state has a well-equipped arsenal of repression with which to reach any desired target.

The post-Tito Yugoslavian leadership has been perplexed by one rather profound event in Medjugorje, where the Virgin Mary is said to be appearing to children from the village there. Since the first report of these apparitions in 1981, hundreds of thousands of pilgrims have flocked to this tiny village from all over the world. At first the authorities tried to suppress the matter, but now Medjugorge provides Yugoslavia's single most visited "tourist attraction."

XII. CONCLUSION

When President Reagan took office, he established three principles to guide future arms control negotiations. They were:

1. Any agreement should lead to meaningful reductions in armament levels.
2. Any agreement should be equitable and have equal effect on both the Soviet Union and the United States.
3. Any agreement should be effectively verifiable.

Subsequently, following a series of detailed studies of Soviet noncompliance, he added a fourth criterion, as follows:

4. Any agreement should be contingent upon a cessation of Soviet violations and upon Soviet compliance with all existing arms control agreements.

These four criteria are the measuring stick by which to judge the Treaty on the elimination of Intermediate Nuclear Forces. The Senate Committee on Foreign Relations has held 31 hearings, listened to the testimony of 76 witnesses, and considered the matter for a total of almost 70 hours, not including markup.

The Senator from North Carolina believes that the following conclusions are fully supported by the results of those hearings:

1. The INF Treaty does not provide any meaningful reduction in armament levels.—Instead, it permits the Soviet Union to recycle its present nuclear weapons, replacing aging delivery vehicles with new ones not covered by the Treaty, and bolting on the same expensive warheads that the Soviets have already produced and paid for. These advantages are not symmetrical, since the United States has only one-quarter as many warheads, and they will not fit on any other delivery vehicle. Soviet warheads can be reused immediately, while U.S. warheads must be stored or reprocessed. The practical impact of the Treaty will be to allow the Soviets to maintain in deployment a nuclear weapons pool covered by the Treaty four times the size of the corresponding U.S. weapons pool, while removing the U.S. weapons entirely. Instead of eliminating an entire class of nuclear weapons, the pro-Soviet ratio of weapons affected by the Treaty changes from 4-to-1 to 4-to-0.

2. The INF Treaty is not equitable and does not have an equal effect on the Soviet Union and the United States.—As already pointed out, the Soviets will be able to modernize and recycle their warhead deployments, while the United States has no practical choice but to dismantle the armaments covered by the treaty. But this technical disproportion barely suggests the devastating political impact which the treaty will have upon the Free World. U.S. strategy has long complacently viewed the superpower confrontation as the axis of the future struggle.

For the Soviets, however, the presence of a non-Communist Europe on the border of the Soviet empire is a significant strategic threat. Even with the creation of Eastern Europe as a buffer zone after World War II, Soviet strategy has always given first place to the neutralization of Western Europe and the removal of nuclear weapons from Western European soil.

The first major Soviet nuclear missile deployments were against Western Europe, not against the United States. With one fell swoop, the INF Treaty removes virtually all NATO nuclear weapons of major deterrent capacity, leaving Europe open to intimidation by the superiority of Soviet/Warsaw Pact ground forces.

No number of congratulatory messages from vulnerable West European leaders can disguise the brutal fact that Western Europe's security will be totally dependent upon the will of the United States to unleash a nuclear holocaust in response to Soviet aggression in Europe.

3. The INF Treaty is not verifiable.—It is not verifiable because we do not know how many SS–20's the Soviets have produced, we do not know how many they have deployed, and we can have no certainty, once the 650 SS–20's they have declared have been eliminated, that a large, covert SS–20 force does not remain. The range of uncertainties is far too great to ratify the treaty in the confidence that "an entire class of nuclear ballistic missiles will be eliminated." It is quite clear that the Soviet covert force could be at least as large again as the force the Soviets have declared, and may be twice as large. Because of the close design relationship between the SS–20, which is covered by the Treaty, and the SS–25, which is not, testing and training using the SS–25 troops and infrastructure would give high reliability to the covert SS–20 forces. While some have tried to assert that the SS–20 deployment was "political"; that is, for purposes of the political intimidation of Western Europe, and had no "military" value, any such force, whether known or covert, has specific military targeting value. Indeed, the surprise factor of a covert force would be even more useful once a military campaign began than a force whose deployment was known.

4. The Soviets have not stopped major violations of current arms control treaties, and, in fact, are in violation of important provisions of the proposed INF treaty even before it is ratified.—Furthermore, there are strong indications that the Soviets have about completed 15 years' work on a forbidden nationwide ABM system, including both aircraft and missile interceptors and a massive, internetted, early-warning and battle-management radar system protecting the perimeter of the Soviet Union. The preparation of such a system is a total violation of the intent of the 1972 ABM Treaty; the manufacture and stockpiling by the Soviets of interceptors and radars for such a system shows fundamental contempt for the arms control process. Soviet ABM breakout is imminent, and will be complete by the time the missiles covered by the INF Treaty have been destroyed. Deployment of the stockpiled components can now be achieved in rapid sequence, at any period when the Soviets choose to break out of the ABM Treaty. Yet right now, when the Soviets are about to deploy the final components of a landbased ABM system, critics of President Reagan's strategic defense initiative are trying to block the protection of the American people by legislating an outmoded, narrow interpretation of the ABM Treaty.

Soviet military doctrine has been completely outlined by authoritative Soviet writers. It has three components, all of them intended to allow the Soviet Union to fight a protracted nuclear war of several weeks. All three components are intended to limit damage to the Soviet Union, while allowing its military forces to fight a nuclear war simultaneously in the main theaters.

The three components of Soviet military strategy include strategic offense, strategic defense, and strategic operations. The concept of strategic offense means the capability to preempt all nuclear forces that can reach the Soviet Union, whether based in the United States, Europe, or China. The concept of strategic defense means ABM protection of the homeland to preserve command and control, party authority, and protection of the population. The concept of strategic operations means combined military operations by rocket, air, naval, and gound forces primarily in Europe, for the purpose of occupying non-Communist countries, installing "peace-loving" governments, and dominating the post-war, socialist world.

From the Soviet point of view, the INF Treaty removes the strategic nuclear threat from Europe, allowing Soviet planners to concentrate on the nuclear threat from the United States and China. The INF Treaty leaves the way clear in Europe for Soviet strategic military operations, using both conventional and nuclear forces, whether there is a nuclear exhange between the United States and the Soviet Union or not. By the time the INF Treaty will have been fully implemented, Soviet ABM breakout will be complete. Thus the Soviets by that time will have achieved all of the three major preparedness goals of Soviet military doctrine, with the possible exception of an unchallengeable capacity to preempt United States ICBM strikes—a goal now being pursued in the START negotiations and the campaign against SDI.

Superiority having been achieved, partly through military deployment and partly through diplomatic maneuver, the Soviets are close to having enough military power to dominate the world. That is why they can now talk in terms of "military sufficiency." for the Soviets, superiority is indeed sufficient.

XIII. RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, together with the Memorandum of Understanding and the two Protocols thereto, collectively referred to as the INF Treaty, all signed at Washington on December 8, 1987 (Treaty Doc. 100–11), provided that the Senate's advice and consent to ratification of the INF Treaty is subject to the following condition, which shall be binding on the Executive:

That this Treaty shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, section 2, clause 2) for the making of treaties:

(a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification;

(b) such common understanding is:

(i) based on the text of the Treaty; and

(ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its Committees in seeking Senate consent to ratification, insofar as such representations are directed to the meaning and legal effect of the text of the Treaty;

(c) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute.

This understanding shall not be incorporated in the instruments of ratification of this Treaty or otherwise officially conveyed to the other contracting Party.

XIV. APPENDIX

A. ITEMS RELATING TO TREATY INTERPRETATION

1. PRINCIPLES OF TREATY-MAKING AND INTERPRETATION

Last year, pursuant to hearings involving leading constitutional authorities and with their assistance, the Committee drafted and approved S. Res. 167, which was intended *inter alia* to identify constitutional principles that govern the Congress, the courts, and the Executive in determining the meaning of a treaty.[24] A discussion of the general principles affirmed in S. Res. 167 (shown below in italics) provides background on treaty-making and treaty interpretation:

(1) *If, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented.* This principle, which is fundamental to the meaning and operation of the Treaty Clause, embraces two precepts:

> —First, if the President transmits an international agreement to the Senate for its advice and consent pursuant to the Treaty Clause, the President may not bring that agreement into force without the Senate's advice and consent. Under the United States Constitution, when the President submits the agreement to the Senate, it constitutes an agreement which does not yet have force and effect. It may thereafter become effective as "Law of the Land" for the United States pursuant to the Supremacy Clause of the Constitution (article VI, clause 2); and it may become effective for the United States as an international obligation. But it takes effect in either legal system only if the Senate gives its advice and consent. The President is precluded, constitutionally, from bringing the treaty into force domestically or internationally without the advice and consent of the Senate.
>
> —Second, if, following such transmittal, the Senate accords its advice and consent, the President then has the option of whether to bring the treaty into force: he is not constitutionally bound to do so. Technically, therefore, it is the President, not the Senate, who "ratifies" the treaty, through deposit of an instrument of ratification in accord with procedures specified or envisaged by the treaty. Presidential ratification is carried out pursuant to Senate advice and consent.

(2) *Under the United States Constitution, a treaty is properly interpreted in good faith in accordance with the ordinary meaning to be given its terms in light of their context and in light of the Trea-*

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[24] The Committee wishes to express particular appreciation to Professors Michael Glennon, Louis Henkin, and Laurence Tribe.

ty's object and purpose. The several terms of art used in this formulation have been developed over the course of many decades by innumerable scholars and tribunals, both international and domestic. It is therefore the central principle of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (Article 31(1)) and is, appropriately, incorporated in the *Restatement of the Law (3d), Foreign Relations Law of the United States* (referred to hereafter as the *Restatement).* This principle "represents what states generally accept," the *Restatement* comments, "and the United States has also appeared willing to accept it, regardless of differences in nuance."

In effect, this principle serves to describe the scope of the President's authority to interpret a treaty. In the absence of adjudication, the President bears the responsibility to interpret U.S. treaties, and his interpretation of a treaty is entitled to great weight in United States law. But the Constitution permits the President, acting alone, only to interpret existing treaties—not to make new ones. To remain within the scope of his constitutional power, the President must genuinely be engaged in the act of treaty interpretation. He cannot engage—by himself—in the act of treaty creation.

The location of the line between interpretation and creation is the subject of this principle. It provides, in effect, that when the President reasonably construes a treaty in good faith in accordance with the ordinary meaning to be given its terms in light of their context and the treaty's object and purpose, he acts within the scope of his constitutional power. When his construction of a treaty cannot be so described, it represents not construction or interpretation at all, but the making of a new treaty, which he can do only with the advice and consent of the Senate.

(3) *The meaning of a treaty is to be determined in light of what the Senate understands the Treaty to mean when its gives its advice and consent.* This principle follows from the proposition that, if the President elects to ratify a treaty, he cannot ratify a treaty different from the one to which the Senate consented—which means that he cannot ratify a treaty with a meaning different from the meaning to which the Senate consented. If the Senate expressed an understanding as to the treaty's meaning, the President must respect that understanding. He can bring the treaty into force as it reflects the Senate's understanding, but he cannot bring into force a treaty that does not reflect the Senate's understanding. For the United States, the meaning of the treaty that the President ratifies is the meaning on which there existed a meeting of the minds between the President and the Senate at the time of Senate consent.

(4) *The understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the Executive branch communicated to the Senate.* The essence of this principle is that the Senate's understanding of a treaty's meaning may be explicit or implicit.

Explicit understandings comprise formal conditions to the Senate's consent. These conditions include amendments to the text of a treaty as well as amendments to the resolution of ratification, such as "reservations," "understandings," "declarations," "statements," and the like.

Implicit understandings represent informal—but equally significant—conditions placed on the Senate's consent. They are reflected in the various materials traditionally described as legislative history. These sources include hearings and committee reports, as well as debates transcribed into the Congressional Record. These sources are regarded as indicia of legislative intent concerning the meaning of a legislative instrument, be it a statute or a treaty.

Legislative intent is also expressed in unchallenged communications of the Executive contained in these sources. Under longstanding principles of textual construction, Executive communications to the Congress concerning the meaning of a text are evidence of the meaning of that text if Congress (or the Senate) acquiesces in that meaning. In other words, the legislative branch is deemed to be placed on notice by the Executive that certain words will be construed in a certain manner. If Congress wishes a different meaning to obtain, it may act so as to effect that different meaning. If Congress does not act, however, it is properly deemed to have accepted—and to intend—the meaning communicated by the Executive.

In testimony to a joint hearing of the Judiciary and Foreign Relations Committees, Professor Louis Henkin, chief reporter of the *Restatement,* summarized this concept as follows: "Where several [Executive] statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative history of a statute."

In determining whether the Senate consented to the ratification of a treaty pursuant to an implicit understanding, a rule of reason must apply. Obviously, where the indicia of intent or understanding (including unchallenged Executive communications or explanations) are few or inconsistent, no implicit intent can reasonably be said to exist. On the other hand, where the indicia of intent (again, including unchallenged Executive communications or explanations) are several and largely consistent, an implicit intent can reasonably be concluded to exist. In such circumstances, the President is bound constitutionally to regard that intent as an implicit understanding, and therefore an implicit condition of the Senate's consent. The Chief Executive cannot bring the treaty into force unless it reflects that condition, and subsequent Presidents must interpret the treaty subject to that intent.

(5) *The Senate's understanding of a treaty cannot be informed by matter of which it is not aware, such as private statements made during the negotiations that were not communicated to the Senate.* While essentially a truism, this proposition is fundamental to the question of treaty interpretation by the United States government. Legislative intent is reflected by legislative history, which is by definition *legislative* history. It does not include history unknown to the legislature, which could not, logically, be part of the "meeting of the minds" between the President and the Senate extant on the date of Senate consent. The events, acts, or interpretations comprising such extraneous activity thus are not properly taken into account in determining what meaning U.S. treaty-makers—the Executive and the Senate—ascribed to the treaty at that time.

This principle does not imply that an untransmitted negotiating record is in all circumstances irrelevant to treaty interpretation. A negotiating record not placed before the Senate at the time of its consent proceedings might conceivably have some bearing on the meaning of a treaty in the event that no meeting of the minds occurred between the President and the Senate with respect to a given issue. In such circumstances, the import of the negotiating record would not displace that of other indicia of the treatymakers' intent.

In sum, where the Senate had no intent or understanding, a negotiating record could have bearing in resolving a question of treaty interpretation so long as the interpretation derived did not conflict with areas of interpretation where the Senate's understanding was clear. But in areas where the Senate clearly intends or understands—or has been formally apprised by the Executive of a particular meaning—the question of what weight is to be accorded an untransmitted negotiating record can be decisively answered. The answer is, None.

(6) *Any subsequent practice between the parties in the application of the treaty is to be taken into account in interpreting the treaty.* Like principle (2) above, this principle has its origins in the Vienna Convention on the Law of Treaties (Article 31(3)). Also like principle (2), this principle is incorporated into the *Restatement* of U.S. foreign relations law, which repeats this principle and notes that "it represents what states generally accept and the United States has also appeared willing to accept it regardless of differences of nuance and emphasis."

An important aspect of subsequent practice is consistent, subsequent interpretation. Statements made consistently and frequently by a government with respect to the meaning of a treaty provision represent "practice." In the case of the United States Government, this means that statements by Executive branch officials, accepted or acquiesced in by the Congress, constitute subsequent practice to be taken into account in determining the meaning of a treaty.

The period of "practice" to be examined consists of that period beginning on the date of the treaty's entry into force and ending on the date on which a particular question concerning the treaty's meaning is raised. In the case of an international dispute, limiting the relevant period of "practice" in this way is necessary lest a government be permitted to bootstrap its way into the very interpretation in controversy by citing its own disputed claims as authority. Similarly, in a dispute between the Senate and the Executive, the Executive's interpretation constitutes evidence of a treaty's meaning only during that period when the Executive's interpretation is not contested. A challenge to such acts or statements brings about the termination of the period of "practice" properly taken into account in assessing the meaning of a particular treaty provision.

(7) *The President may not amend a treaty without the agreement of the parties and the advice and consent of the Senate.* Both the Vienna Convention on the Law of Treaties and the *Revised Restatement* of U.S. foreign relations law set forth the requirement that agreement between the parties precede any amendment of a treaty.

This principle is obviously seminal in international law; treaties are made jointly and can only be modified jointly.

Also fundamental is the requirement of Senate advice and consent. Although not addressed directly by the *Restatement*, support for the proposition is implicit in its declaration that "The power of the President to terminate an international agreement does not imply authority to conclude a new one in its place." Were the President to amend an agreement on his own, he would in effect be terminating an old agreement and entering into a new one.

Constitutionally, the question of treaty amendment is crucial because a unilateral presidential power to amend treaties would vitiate the Senate's power to approve a treaty conditionally. With the agreement of the other party or parties, the President could simply ignore the Senate and remove any Senate-added reservation or any other treaty provision no longer desired. The Constitution does not accord the President such power. Instead, the President possesses a limited power of treaty interpretation, and he acts within the scope of that power when he interprets a treaty in accordance with the principles cited above.

When the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one. And he is not entitled to disguise that reality by calling his action an "interpretation" or "reinterpretation" of the existing treaty. He is engaged in the act of treaty amendment or of treaty-making; each such act requires the advice and consent of the Senate.

(8) *All treaties made shall be the supreme law of the land, and the President is required to take care that the laws be faithfully executed.* These constitutional provisions are included for the purpose of recalling the President's solemn obligation to abide by the provisions of treaties. Nothing in the United States Constitution permits the President to flip freely through *Treaties in Force* and, armed with a red pencil and white-out, make such additions, deletions, and modifications as he might wish. The President is not empowered to amend U.S. treaty commitments; he is charged to uphold them. Treaties are laws, and the President's duty of faithful execution applies as fully to treaty law as it does to statutory law. The President takes an oath of office in which he swears to "preserve, protect, and defend the Constitution of the United States." When the President violates a treaty provision, he violates his oath of office.

2. LETTER FROM SECRETARY SHULTZ

THE SECRETARY OF STATE,
Washington, DC, February 9, 1988.

Hon. SAM NUNN,
U.S. Senate,
Washington, DC.

DEAR SENATOR NUNN: I am responding to your letter of February 5 concerning the INF Treaty. I am pleased that we have resolved the question of Senate access to the INF negotiating record. I believe that we can also resolve the remaining questions posed by your letter in a manner that accommodates the interests of all concerned and serves the national interest.

Your letter asks for our agreement on three points. Your first point is that the testimony of all Executive branch witnesses and any submissions for the hearing record by the Executive branch on the Treaty can be regarded by the Senate as authoritative. We agree. All INF testimony of Executive branch witnesses, within their authorized scope, is authoritative. We will inform the relevant Committee of any instance in which a witness' testimony is not authoritative in any respect.

Your second point is that the meaning of the Treaty as presented to the Senate can be regarded by the Senate as authoritative without the necessity of the Senate's incorporating that testimony and material in its Resolution of Ratification through understandings, reservations, amendments, or other conditions. Again, we agree. Administration testimony and materials for the record can be regarded as authoritative, as described above, without the need for the Senate to incorporate them in its Resolution of Ratification.

Your third point is that a meaning for the Treaty different from that presented to the Senate by the Reagan Administration cannot be adopted without the approval of the Senate. I can assure you that the Reagan Administration will in no way depart from the INF Treaty as we are presenting it to the Senate.

I hope that this letter will help us resolve these important questions.

Sincerely yours,

GEORGE P. SHULTZ.

3. LETTERS FROM WHITE HOUSE COUNSEL CULVAHOUSE

THE WHITE HOUSE,
Washington, DC, March 17, 1988.

Hon. RICHARD G. LUGAR,
U.S. Senate,
Washington, DC.

DEAR SENATOR LUGAR: This letter responds to your letter to Howard Baker of March 9, 1988. The Administration has reviewed the attached March 2 draft of a proposed Senate resolution of advice and consent to the ratification of the INF Treaty.

For the reasons discussed below, the Administration believes that sections 1 and 2 of the Resolution (hereinafter these sections are referred to as the "Resolution") are seriously flawed. The Resolution would change the legal rules of treaty interpretation. It would impose an unconstitutional mechanism for the alteration of a treaty interpretation. Moreover, it would greatly increase the risk of inflexible distinctions between the meaning of a treaty for purposes of international law and its meaning for purposes of domestic law—distinctions that could operate to the disadvantage of the United States.

Therefore, we believe the Resolution is not in the best interests of the United States.

Changing the Rules of Treaty Interpretation

We agree that the Executive is, as a matter of domestic law, required to adhere to the interpretation of a treaty authoritatively shared with, and clearly intended, generally understood and relied upon by, the Senate at the time of its advice and consent to ratification. The Resolution, however, would purport to expand the Executive's obligation beyond this settled principle. Sections 1(b) and 2 of the Resolution apparently would define that shared understanding as encompassing all statements made by officials of the Executive branch during ratification proceedings. These statements presumably include and attribute equal dignity to the Secretary of State's definitive article-by-article analysis and to the extensive testimony of Cabinet Members, treaty negotiators and other Executive branch officials, as well as to the Administration's answers to over 1,000 questions submitted by Members of the Senate, no matter how trivial or how unimportant the issue addressed may be to the Senate's advice and consent deliberations.

This overly broad standard is inconsistent with the principles governing judicial interpretation of treaties as a matter of domestic law. Such a general statement would not in our view provide the guidance required for the President or a court to give meaning to the INF Treaty.

Section 1 of the Resolution focuses solely on the role that Executive representations play in the interpretation of treaties, but fails to acknowledge the most important interpretative tool—the text of the treaty itself. Ignoring the text of the Treaty is inconsistent with bedrock rules of treaty interpretation, which mandate that the text is the best evidence of the parties' intent. Although "authoritative representations" are among the tools for interpreting ambiguous provisions in a treaty under domestic law, the language of the treaty is the primary means by which a treaty is interpreted.

Unconstitutional Mechanism for Altering Treaty Interpretation

Section 1(c) of the Resolution would purport to grant the Senate a role in interpreting treaties not contemplated by the Constitution. Section 1(c) states that the "United States shall not agree to or adopt (a different) interpretation" of a treaty "without the approval of the Senate." This provision of the Resolution and the Section 1(b) incorporation by reference of all Executive statements as critical shared understandings purport to provide the Senate with an ongoing power to accept or reject subsequent Executive interpretations and implementations of the INF Treaty. A "reinterpretation," subject to Senate approval, seemingly would occur each time implementation of the treaty calls into question any Executive statement in the massive ratification record. This section, therefore, interferes with the President's constitutional responsibility to interpret and implement treaties and also constitutes an unprecedented arrogation of treaty power by the Senate.

The Constitution does not provide that treaties may be amended by the Senate and the Executive acting alone after ratification, nor does it permit unicameral "interpretive" legislation. The provisions in sections 1(c) and 2 that contemplate such a process are not consistent with the Constitution.

Risk of Unilateral Restrictions on the United States

As noted above, when interpreting a treaty, one obviously looks first and foremost to the text of the treaty itself. In instances where the treaty text is not dispositive or is unclear, under international law one looks primarily to the negotiating record and the subsequent practice of the treaty parties. As a matter of domestic law, however, the President is bound by shared interpretations which were both authoritatively communicated to the Senate by the Executive and clearly intended, generally understood and relied upon by the Senate in its advice and consent to ratification. This is true even if the treaty negotiating record and subsequent practice indicate an interpretation contrary to that shared understanding. Exchanges in Senate proceedings in connection with the ratification of a treaty cannot under international law alter the meaning of a treaty where they are not officially communicated to the other treaty party prior to the exchange of instruments of ratification. The result might be two INF Treaties, one binding domestically against the President and a second one binding internationally between the United States and the Soviet Union. In our view, the Resolution would substantially increase this risk of a dichotomy between the interpretation of a treaty under international law and the interpretation to which the President constitutionally is bound under domestic law. While we have spared no effort to ensure that Administration statements reflect the correct interpretation of the INF Treaty, the magnitude of the record heightens the risk of divergence between our domestic and international legal obligations. Any such difference will favor the Soviet Union because the Soviet Union is not and cannot be bound by our domestic processes.

The principles of treaty interpretation stated herein in no way contradict the position previously taken by the Administration with respect to the ABM Treaty. The President is obligated to abide by a treaty interpretation clearly intended, generally understood and relied upon by the Senate, based on authoritative Executive Branch representations during its advice and consent to ratification. Our position in the ABM case is not that the President may disregard such clearly intended interpretations, but rather that the ABM Treaty ratification record does not establish as a matter of law that the Senate clearly intended that the restrictive interpretation be followed. Administration witnesses had presented inconsistent and ambiguous views on the reach of these provisions, and the Senate as a whole did not assert a view. The President, therefore, is legally entitled to interpret the ABM Treaty on the basis of materials other than the ratification record, including the negotiating history. As you know, we believe that the negotiating record shows that the Soviet Union did not agree to be bound to the restrictive interpretation.

This letter is presented in the spirit of cooperation and in the hope that the Senate and the Executive can agree that the INF Treaty should receive the advice and consent of the Senate without any conditions. We do not believe that it is necessary or desirable to address broad, free-standing constitutional principles in a resolution of advice and consent. We believe that the proposed Resolution only serves the interests of confusion, ambiguity, confrontation and uncertainty. This Administration, of course, intends to consult closely with the Senate as the INF Treaty, upon ratification, is implemented and interpreted, and we will continue to embark upon such consultation in candor and good faith.

This letter also reflects the views of the legal offices of the Department of State, Department of Defense, the Office of Legal Counsel, Department of Justice, the Arms Control and Disarmament Agency, and National Security Council.

Sincerely,

ARTHUR B. CULVAHOUSE, Jr.,
Counsel to the President.

THE WHITE HOUSE,
Washington, DC, March 22, 1988.

Hon. RICHARD D. LUGAR,
U.S. Senate,
Washington, DC.

DEAR SENATOR LUGAR: Discussions concerning my letter to you of March 17, 1988, have raised a question about the Secretary of State's identical letters of February 9, 1988, to Senators Byrd and Nunn. To clear up any misunderstanding that may exist, I should like to assure you that no inconsistency was intended or in fact exists between my letter and Secretary Shultz' letters. Whereas Secretary Shultz responded to the Senators' request for assurances regarding the "authoritativeness" of Executive branch testimony on the INF Treaty and the Senate's ability to rely on such testimony, my letter addressed a specific draft text setting forth what we believe to be unconstitutional and unworkable rules of treaty interpretation.

As the Secretary of State's February 9 letters pointed out: (1) all INF testimony of Executive branch witnesses, within their authorized scope, is authoritative; (2) Administration testimony and materials for the record can be regarded as authoritative without the need for the Senate to incorporate them in its Resolution of Advice and Consent; and (3) the Reagan Administration will in no way depart from the INF Treaty as we are presenting it to the Senate. Those letters remain an accurate statement of our policy and intention with respect to the INF Treaty.

My March 17 letter is consistent with Secretary Shultz' statement of Administration views.

Sincerely,

ARTHUR B. CULVAHOUSE, Jr.,
Counsel to the President.

4. CHRONOLOGY OF EXECUTIVE/SENATE ACTION ON TREATY INTERPRETATION

1. October 1985: The Reagan Administration announces the "broad" interpretation of the ABM Treaty, which would permit extensive testing in space of SDI. The traditional interpretation severely restricts such testing. Subsequently, various Administration rationales are offered.

2. March 1987: State Department Legal Adviser Sofaer, in testimony before the Foreign Relations Committee, asserts that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] was provided." This statement is viewed as a threat to the Senate's constitutional role in treaty-making because it implies that treaties are "made" irrespective of the Senate's understanding of a treaty.

3. May 1987: The Foreign Relations Committee approves the Biden Resolution (S. Res. 167) by a vote of 11–8. The resolution affirms that the President is bound, constitutionally, to an interpretation which the Executive branch presented during ratification proceedings.

4. May 1987: Mr. Sofaer provides the President with a study on the ratification proceedings of the ABM Treaty. The study asserts that the President is bound to a specific interpretation of a treaty only if that interpretation was "generally understood," "clearly intended," and "relied upon" by Senators during the ratification proceedings. The assertion of these criteria subsequently comes to be known as the Sofaer Doctrine.

5. September 1987: As part of the FY 1988 Defense Authorization Bill, the House and Senate enact Levin-Nunn legislation prohibiting the President from conducting space-based and other mobile ABM tests which would violate the traditional interpretation on the grounds that such authority was not sought in the submission of the Defense Budget. Authors of the language assert that the vote was not about the validity of the Administration's new interpretation of the ABM Treaty.

6. September 1987: Senator Nunn demands that the Administration provide the Senate with the INF Treaty "negotiating record" as a result of the Sofaer Doctrine.

7. November 1987: Senator Pell, in an effort to finesse the "negotiating record" issue, seeks an authoritative analysis by the Administration of the INF Treaty "negotiating record."

8. January 1988: Negotiations begin between Secretary Shultz and Senators Pell, Byrd, and Nunn. The Senators seek a letter from the Secretary of State asserting that Reagan Administration testimony is authoritative and binding upon the Executive.

9. February 5, 1988: Secretary Shultz sends a letter to Senator Byrd. The letter merely affirms the transfer of the "negotiating

record" but does not address the question of whether Executive Branch testimony will be both "authoritative" and "binding."

10. February 5, 1988: Senators Nunn and Byrd respond to the Shultz letter by threatening to hold up the ratification proceedings on the INF Treaty unless the Administration assures the Senate that the testimony of Administration officials is "authoritative" and "binding." Nunn and Byrd say that, without such assurances, the Senate will have to fully examine the "negotiating record" and attach reservations and understandings to the Resolution of Ratification on each provision of the Treaty to ensure that a future President cannot change the meaning of the Treaty as presented by the Executive.

11. February 9, 1988: Secretary Shultz responds to the Byrd/Nunn letter. He asserts the following: (1) all INF testimony is "authoritative," unless the various Committees are told otherwise; (2) the testimony is "authoritative" without the need for understandings in the Resolution of Ratification; and (3) the Reagan Administration will in no way depart from the meaning of the Treaty presented to the Senate. While the letter states that Administration testimony is "authoritative," it does not state that such "authoritative" testimony is "binding" upon the Executive.

12. February 1988: In testimony before the Foreign Relations Committee, Ambassador Nitze asserts that "with respect to domestic law, an authoritative statement by a member of the Executive Branch is determinative as to what the meaning of the Treaty is from the standpoint of domestic law."

13. March 1988: Secretary Shultz tells the Foreign Relations Committee in a written response that Administration testimony on the INF Treaty "can be regarded as authoritative * * * without the need for the Senate to incorporate them in its resolution of ratification." He adds, however, "Of course, we cannot bind future Administrations." This answer is consistent with the Administration's earlier refusal in the Shultz letter of February 9 to state that all "authoritative" testimony would be "binding."

14. March 17, 1988: White House Counsel Arthur B. Culvahouse, Jr. sends a letter to Senator Lugar commenting on the proposed Biden Condition. The Culvahouse letter asserts that it reflects the views of all the relevant legal counsels in the Administration (State, Defense, ACDA, Justice, and NSC). The Culvahouse letter does not question whether all Administration testimony is "authoritative." Rather, the letter states that all "authoritative" testimony is not "binding" unless the Senate can demonstrate that a given interpretation was "generally understood," "clearly intended," and "relied upon" by the Senate.

15. March 22, 1988: A second letter is sent to Senator Lugar by Culvahouse. The second Culvahouse letter merely states that the first Culvahouse letter is consistent with the February 9 Shultz letter. This assertion of consistency seems correct because the Shultz letter, while stating that all Administration testimony is "authoritative," did not state that all "authoritative" testimony is "binding." Indeed, the key premise of the first Culvahouse letter is that "authoritative" testimony is not binding unless the Senate has fulfilled the criteria of the Sofaer Doctrine.

5. EXCHANGE BETWEEN SENATOR BIDEN AND AMBASSADOR NITZE

(INF Hearings of the Senate Foreign Relations Committee, February 1, 1988)

Senator BIDEN. Well, Mr. Ambassador, in closing I want to ask you a question for reasons that I think you will understand.

Is it fair for the Committee to consider your testimony on the meaning of this treaty as authoritative?

Ambassador NITZE. I believe so. But I would like to go over the transcript and be sure that it is thoroughly corrected and that it is authoritative after it has been reviewed.

Senator BIDEN. Again, I am not in any way questioning your judgment or your knowledge, you understand.

Ambassador NITZE. No, I know what you are talking about. It is a legitimate question.

Senator BIDEN. Well, I would invite you to do that.

Ambassador NITZE. I want to be sure that it is authoritative.

Senator BIDEN. Good, that would be helpful. How should a legal advisor 10, or 15 years from now, who decides that he wants to discount your testimony——

Ambassador NITZE. Want to discount my testimony?

Senator BIDEN. Discount your testimony as to the meaning of the INF agreement and reinterpret it. How should that be viewed?

Ambassador NITZE. I think what he would say is that with respect to domestic law, an authoritative statement by a member of the Executive branch is determinative as to what the meaning of the treaty is from the standpoint of domestic law.

I believe it is also true that from the standpoint of international law, what is determinative is the language of the treaty itself. And the negotiating record with respect to how that language was arrived at, and not the testimony, my testimony before this committee.

Senator BIDEN. Let me make sure that I understand that. You believe your testimony before the Committee would be binding as it relates to domestic law, that is, the Constitution?

Ambassador NITZE. Yes; that is, that I think one should not change that without getting the concurrence of the Congress thereto, as a matter of domestic law. As a matter of international law, I think that is a different matter.

B. REPORT OF THE SENATE INTELLIGENCE COMMITTEE

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC, March 21, 1988.

Hon. CLAIBORNE PELL,
Chairman,
Hon. JESSE HELMS,
Ranking Minority Member,
Committee on Foreign Relations, Washington, DC.

DEAR SENATOR PELL AND SENATOR HELMS: The Senate Select Committee on Intelligence (SSCI) has been charged with the responsibility of providing to the United States Senate a report on the ability of the United States to monitor and verify compliance by the Soviet Union with the Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (the INF Treaty). In meeting this responsibility, the SSCI has explored in depth not only the immediate intelligence issues raised by the Treaty, but also the longer-term implications of the Treaty, including its relationship to future requirements that may be levied against our intelligence capabilities. Accordingly, the Committee specifically considered the requirements that attend any prospective START agreement. Of course, the Committee wishes to make clear that this report is not an assessment or prejudgment of START or its monitoring requirements, but rather an indication of the impact that START may have on the INF Treaty.

The Committee's efforts in preparing this study have been long and comprehensive. We have followed both negotiations and arms control monitoring on a continuing basis. In our annual budget authorization process, we have focused on U.S. technical intelligence capabilities, both for now and the future. Indeed, for several years, this Committee has worked with the Executive branch to obtain needed funding for improvements in our technical collection capabilities, while encouraging the Intelligence Community to use those funds as efficiently as possible.

Over the last six months, when the INF talks gained momentum and finally concentrated on verification issues, the Committee's study of U.S. monitoring capabilities has been intensive. From last September until today, the Committee has had 15 closed hearings and 17 on-the-record staff briefings on INF monitoring, in addition to many informal staff briefings. Our witnesses have included ranking officials and substantive experts from the CIA, DIA, NSA, intelligence arms of the military services, the Intelligence Community Staff, the State Department, the Arms Control and Disarmament Agency, the Defense Department, the Joint Chiefs of Staff, former defense officials who are leading authorities on arms control, and (on counter-intelligence implications of on-site inspection) the FBI.

In addition to these proceedings, and the thousands of pages of documents that the Committee has studied, both we and our staff have traveled to many of the most important installations where monitoring systems are produced or operated, as well as to the site at Magna, Utah, where Soviet portal monitors will be able to observe items entering and leaving a U.S. missile production facility. In short, we have endeavored to ensure that every issue was fully addressed during the course of our work.

The purpose of this unclassified report is to address generally the issues involved in the monitoring and verification process and to describe the role which monitoring and verification plays in the overall assessment of the INF Treaty. Each of these issues is addressed in detail in the classified report available to each member of the U.S. Senate, and to whom the work of the SSCI is ultimately directed.

Thank you for the opportunity to present these important matters to the Foreign Relations Committee.

Sincerely,

David L. Boren,
Chairman.
William S. Cohen,
Vice Chairman.

SENATE SELECT COMMITTEE ON INTELLIGENCE

The INF Treaty: Monitoring and Verification Capabilities

(ADOPTED BY UNANIMOUS VOTE MARCH 21, 1988)

For Members of the Senate Select Committee on Intelligence (SSCI), and consistent with the Committee's responsibility to the Senate as a whole, the appropriate starting point for analysis of the Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (the INF Treaty) is to assess its verifiability. Several preliminary points should be made regarding this assessment.

First, the Committee notes that the answer to the question of verifiability is not a simple one. It is a matter of degree and sufficiency. Since no verification and monitoring regime can be absolutely perfect, a central focus for the Committee has been to determine whether any possible infractions would be of sufficient military significance to constitute a threat to our national security interests. This calculus is one which the Senate should bear in mind in its consideration of the Treaty.

Second, the Committee would note that U.S. intelligence requirements should not be dictated solely by arms control Treaty monitoring needs. The Committee believes that monitoring Soviet activities is necessary not only to verify arms control agreements, but also to provide timely warning of possible threats that are not prohibited by the Treaty. Accordingly, the Committee paid close attention to whether our current and proposed capabilities—human, technical and otherwise—are sufficient to meet current demands, as well as emerging future requirements. When certain systems are limited or eliminated by agreement, other military developments which are perfectly legal under treaties take on a new significance and could affect the strategic balance between the U.S. and potential adversaries. We must have the capability of monitoring such developments not addressed under the INF Treaty.

One of the most challenging tasks the Intelligence Community could face in the near future is the monitoring of a prospective START agreement. An agreed cut in Soviet and U.S. Strategic nuclear forces would change the requirements for U.S. intelligence for several reasons:

> Under current proposals, envisioning a system of limits and sublimits on strategic arms, as opposed to the bans employed by the INF Treaty, significant violations would be more difficult to detect;
>
> Soviet violations of START could have a greater impact on U.S. national security than any plausible violation of the INF Treaty;
>
> Unanticipated improvements in Soviet strategic offensive and defensive capabilities could make the lower levels of U.S. strategic forces set by START more vulnerable;
>
> Even in the absence of START, the balance of strategic forces could be undermined or upset by possible Soviet technological breakthroughs, offensive forces improvements, or possible breakouts from ABM Treaty limits.

The Committee believes that without continuous attention to improving our intelligence capabilities, the Intelligence Community may not be able to monitor a START Treaty well enough to ensure U.S. security. Indeed, the burdens of monitoring Soviet military activities that are not constrained, as well as those that are constrained by the INF and any prospective START Treaty, could put strains on the future capabilities of the Intelligence Community, especially in an environment of limited funding for intelligence activities.

The Committee feels that this potential gap between intelligence capabilities and intelligence requirements must be appreciated by Members of the Senate. Thus, this report and its classified annex raise the issue in connection with consideration of the INF Treaty.

Third, the Committee would observe that in negotiating an arms control agreement, verification is only one of many objectives that must be served. Indeed there are inevitable tensions between the need for effective verification and the desire for strategic stability. The current U.S. position in Geneva is to seek a ban on mobile missiles, largely because of the verification problems they may pose. On the other hand, mobility enhances strategic stability by reducing the opportunity for preemptive strikes. In any arms control proposal we advance, we must always keep open the possibility of allowing ourselves the flexibility to adopt systems needed for our own national security even if it makes verification less certain. In other words, verification cannot be viewed in a vacuum. It is but one factor that must be balanced with other competing interests for our own security.

In the INF agreement, the United States has sacrificed the right to deploy a conventional long-range, ground-launched cruise missile (GLCM) against the Warsaw Pact, principally because monitoring the distinction between nuclear and conventional cruise missiles is difficult. Some Members of the Committee believe that other national security interests may have been subordinated to verification considerations on the GLCM issue. This has raised serious concerns among Members of the Committee that similar considerations of verifiability in START could lead to unduly restrictive limitations on future U.S. options for conventionally armed air-launched and sea-launched cruise missiles.

Another example of the tension between monitoring requirements and overall strategic needs is the fact that there are no on-site inspection rights provided for undeclared or suspect sites. These problems are most pronounced with respect to the possibility of covertly stored missiles at undeclared facilities in the Soviet Union. In this case, legitimate U.S. security interests argued against allowing the Soviets greater presence and access in the United States than granted by the Treaty. Our own counterintelligence concerns about potential Soviet exploitation of on-site inspection rights may again outweigh the need for more intrusive and direct verification in future negotiations.

Finally, the Committee would emphasize that the conclusions with respect to monitoring and verification do not necessarily control the final decision each Senator must make with respect to whether the INF Treaty should be ratified. Rather, the verifiability of the Treaty is only a part of the analysis that each Senator must make, and the weight given to verifiability in making his or her final decision regarding ratification properly resides with each individual Member.

VERIFICATION REQUIREMENTS AND MONITORING CAPABILITIES

Effective verification.—Knowing whether or not the Soviets are cheating—is essential to enforcing strict compliance. And good intelligence—monitoring all aspects of Soviet strategic behavior—is the key to effective verification. Between the extremes of blindly trusting the Soviets and trying to follow their every move, what level of monitoring is needed to verify and enforce the INF Treaty? Are U.S. monitoring capabilities good enough to make the INF Treaty effectively verifiable? To answer these questions, it is helpful to distinguish among the functions and officials involved in dealing wth suspected violations.

Monitoring.—Monitoring is the responsibility of the Intelligence Community, which reports on what the Soviets do, using all the information available from U.S. on-site inspectors, our National Technical Means, and other sources of information on Soviet missiles and related activities.

Verification.—Verification is the responsibility of the Executive branch, which decides whether the Soviet behavior reported by the Intelligence Community is permitted by the Treaty, based on the text of the Treaty, relevant records, diplomatic exchanges, and applicable law.

Enforcement.—Enforcement is the responsibility of the President, acting in concert with the Congress, in proposing and pursuing a course of action if a violation is found. Options for enforcement include seeking Soviet compliance by diplomatic means, denouncing the violation publicly, threatening to withdraw from the Treaty, or ultimately countering the violation with new military programs of our own.

Each option depends on the United States having the will to act in the face of a confirmed violation. To be effective, monitors, verifiers, and enforcers will need good information on Soviet intentions, as well as capabilities, in order to make critical decisions. To do nothing is advisable only if confronting the Soviets with the violation would jeopardize the sensitive intelligence sources and methods on which we rely for detecting more serious threats.

Moreover, to deter the Soviets from cheating in the first place, the U.S. must reinforce Soviet expectations that Treaty violations would be discovered and countered if they did so.

In the case of the INF Treaty, detecting any possible violations involves three sets of monitoring requirements:

—assessing the accuracy of the numbers and locations of INF systems declared by the Soviets in the Treaty's Memorandum of Understanding.

—observing the drawdown and elimination of INF systems in accordance with the procedures set forth in the Protocol on Elimination.

—detecting any production, testing, or deployment of INF systems.

ASSESSING SOVIET DECLARATION

With respect to assessing the accuracy of the numbers and locations of forces and systems declared by the Soviets in the Treaty's Memorandum of Understanding, the Intelligence Community has not resolved significant differences of view over the possibility that the Soviets may not have disclosed their entire inventory of non-deployed SS-20 missiles. These differences represent valid analytical judgments based on the limited and inconclusive information that has been available to the Intelligence Community.

Whether or not these differences can be resolved in the future, on the basis of new information or analysis, their potential military significance would be short-lived. This is because the operational reliability and military utility of any covertly maintained missiles would begin to deteriorate immediately; would seriously degrade during the first three years, when all declared missiles are being eliminated; and would vanish entirely within a decade, unless the Soviets can resume flight testing them. This would be both illegal and readily detectable.

OBSERVING DRAWDOWN AND ELIMINATION

With respect to declared INF systems, we can expect Soviet cooperation in permitting U.S. inspectors to observe their elimination, because they will have a strong interest in showing us that they are fulfilling their Treaty commitments. If the Soviets fail to cooperate, we will know it well before we have eliminated our own INF systems and could retain them until they cooperated. So, by fully implementing the Inspection Protocols of the INF Treaty, the U.S. will not need to rely on National Technical Means to verify the complete elimination of the Soviet's declared INF systems.

DETECTING ILLEGAL SYSTEMS AND ACTIVITIES

At the same time, U.S. intelligence must also seek to ensure that there are no illegal INF systems that should have been declared or that have been covertly stored, diverted, tested, or produced in violation of the INF Treaty. In contrast with Soviet interests in showing our inspectors their declared inventories of INF systems and their elimination, we must expect the Soviets will try to conceal any illegal systems or activities.

That is why the U.S. must be able to monitor Soviet missile-related activities, no matter how well concealed. In particular, verifying the INF Treaty's ban on all Soviet ground-based missiles for weapons-delivery with ranges of 500–5,500 kilometers will require that we monitor Soviet missile testing, production, and deployments with the best National Technical Means available.

Yet, as noted previously, even with the best technical means in the world, the United States cannot expect to discover every prohibited activity that the Soviets have plausible incentives to conduct clandestinely. Concealing a few, small illegal activities or assets is just too easy in a closed society like the Soviet Union. However, there is little apparent advantage to Soviet military commanders, and there are certainly significant risks, in developing any covert forces that cannot be exercised realistically or tested fully because they must remain strictly concealed all the time to minimize any chance of detection.

Moreover, the INF Treaty's ban on the testing of any ballistic missiles for weapons delivery with ranges between 500 and 5,500 kilometers can be monitored with high confidence. This makes it exceedingly difficult, costly, and risky for the Soviets to develop or maintain a militarily useful, covert force of ballastic missiles, especially longer-range missiles, which violates the INF Treaty at worst, a Soviet short-range ballistic missile might be tested to a range of slightly over 500 kilometers without U.S. monitoring capabilities being able to verify that it is a treaty violation, but the Soviets would have little to gain and much to lose from conducting such a test.

U.S. National Technical Means of verification are not as highly effective against ground-launched cruise missiles (GLCM's) within these ranges, testing within which are likewise banned by the INF Treaty. In particular, an illegal force of GLCM's could probably not be detected nearly as promptly nor with the same high degree of confidence. This is due to their much smaller size and to the fact that they are in almost all respects identical with and virtually indistinguishable from sea-launched versions of the same missile, which are not banned by the INF Treaty.

Still, any militarily significant training or deployment of a covert force of ground-launched cruise missiles would be subject to detection by the United States. This is because it would necessarily involve a sizable number of troops and technicians, as well as special security arrangements associated with highly sensitive activities, especially the illegal training or deployment of a nuclear-capable missile force. Moreover, in contrast with the SS–20, the Soviets have never developed the infrastructure for such a force of GLCM's. So, the Soviets could not have much confidence that they could maintain or deploy a ready ground-launched cruise missile force banned by the INF Treaty without being caught.

FINDINGS AND CONCLUSIONS

The key unclassified findings and conclusions of the Committee are as follows:

> The Committee believes that by a combination of National Technical Means and on-site inspection, the intelligence community will be able to monitor the drawdown and elimination of declared Soviet missiles launchers and associated equipment with great certainty.
>
> The Committee notes that the on-site inspections established by the Treaty are applicable only to facilities declared by the Soviets in the Memorandum of Understanding. Therefore, the burden of detecting banned activities at undeclared sites, where they are most likely to occur, will fall on National Technical Means of verification.
>
> The specific requirements imposed by the Treaty, including the bans on production, flight testing and storage, will limit the ability of the Soviets to maintain non-deployed missiles in a high state of readiness. These provisions increase both the probability of detecting cheating and the cost of cheating for the Soviets. At the same time, however, Soviet compliance with some of the Treaty's provisions will be difficult to monitor.
>
> This problem is exemplified by the unresolved controversy between DIA and other intelligence agencies over the number of SS–20's in the Soviet inventory. In any event, the Treaty's ban on flight testing, will over time limit the military utility of any SS–20's that the Soviet Union might covertly maintain.
>
> At the same time, the Committee notes that the flight test ban is uneven in its application against weapons systems eliminated by the Treaty. It is effective in limiting the military reliability of a covert SS–20 force, but far less relevant to ground-launched cruise missiles and shorter-range ballistic missiles.
>
> Ground-launched cruise missiles pose a particularly difficult monitoring problem as they are interchangeable with long-range Soviet sea-launched cruise missiles (SLCM's). So long as SLCMs are not banned, their testing will allow a Soviet military planner to fulfill all of the technical requirements for testing a covert GLCM. The lack of a ground forces infrastructure for such weapons, however, would be extremely difficult for the Soviets to overcome covertly, and this greatly lessens the value and probability of such a cheating effort.
>
> We are concerned that the Soviets could covertly extend the range capability of a cruise missile, or covertly develop a new ground-launched cruise missile with a prohibited long-range capability, if the cruise missile were tested only to shorter ranges.
>
> Yet the Committee believes that the risk of a Soviet attempt to cheat with such an extended range capability is offset by Soviet operational requirements. Soviet military planners would have serious problems with the reliability of systems not tested to their maximum range.

In the case of short-range ballistic missiles (SRBM's) the Committee does not foresee the need for the Soviets to cheat since they can easily and legally develop a new or modernized SRBM with a demonstrated range less than 500 kilometers.

Moreover, the Soviets could not test any short-range ballistic missile much beyond the 500 kilometer limit without the United States detecting the violation.

The Committee believes that in the absence of a START agreement, the Soviets have little or no incentive to cheat. With 10,000 warheads in their strategic arsenal today, the Soviets can cover INF and global targets and still have several thousand warheads in reserve.

In an INF/START environment, however, the monitoring, cheating and risk calculus changes substantially. The Soviet incentive to cheat could increase because of a greater difficulty in meeting targeting requirements. The military significance of any cheating will increase because of lower U.S. force levels.

But the Soviets would have greater difficulty maintaining a covert force of intermediate-range ballistic missiles in a START regime with new limits on road-mobile strategic ballistic missiles and new provisions for short-notice inspections of undeclared facilities.

The monitoring of numerical limits, rather than a ban, and of qualitative restrictions will make the satisfaction of collection requirements and, therefore, the detection of cheating far more difficult.

The U.S. Intelligence Community must be prepared to meet two priorities under a START environment—where the United States and the Soviet Union have agreed to reduce their strategic offensive forces while also complying with the INF, ABM and other arms control treaties. The first involves monitoring those weapons systems and activities limited or banned by arms control treaties. The second involves military activities which are not limited by treaties, but which take on an added importance as a result of their constraints.

By cutting strategic offensive forces on both sides by roughly 50 percent, a START agreement would raise the importance of intelligence on Soviet developments in other areas that would threaten survivability and effectiveness of scaled back U.S. strategic forces.

Indeed, it is potential combinations of simultaneous developments in Soviet strategic offensive and defensive forces, particularly its capabilities against U.S. satellites, ballistic missile launchers and cruise missiles that raise the most urgent concerns about threatening shifts in the strategic balance between the Soviet Union and the United States. Moreover, it is in areas not limited by a treaty where such Soviet efforts are likely to be most active.

The Committee accordingly recommends that the Congress authorize and appropriate funds required to initiate a long-term program to modernize and improve upon current plans for intelligence collection. It specifically recommends investing more in programs that would be most helpful in verifying a

START Treaty, in preventing technological surprise and in supporting U.S. policy and operations in crises.

Many of the details regarding the precise nature of our inspection rights are still being negotiated with the Soviets. A constructive process has been put in motion to secure U.S. objectives in these negotiations, although this has not yet been achieved.

The extensive on-site inspection and portal monitoring that may be required by a START agreement, including suspect site inspections, could have a far more significant impact on U.S. counterintelligence and security interests than those agreed to in the INF Treaty.

C. Report of the Senate Armed Services Committee

U.S. Senate,
Committee on Armed Services,
Washington, DC, March 29, 1988.

Hon. Claiborne Pell,
Chairman,
Hon. Jesse Helms,
Ranking Minority Member,
Committee on Foreign Relations, Washington, DC.

Dear Claiborne and Jesse: Enclosed are enough copies of the Armed Services Committee's report on "NATO Defense and the INF Treaty" for every Member of the Foreign Relations Committee. We hope this report will be helpful in the Foreign Relations Committee's consideration of the INF Treaty.

Members of the Armed Services Committee have until the end of the day on Thursday, March 31, to file additional or minority views on this report. The final printed report will contain any such additional or minority views.

Sincerely,

Sam Nunn,
Chairman.
John W. Warner,
Ranking Minority Member.

NATO DEFENSE AND THE INF TREATY—REPORT OF THE COMMITTEE ON ARMED SERVICES OF THE U.S. SENATE

March 28, 1988

[Note.—Members of the Armed Services Committee have until the end of the day on Thursday, March 31, to file additional or minority views on this report. The final printed report will contain all such additional or minority views.]

NATO Defense and the INF Treaty

When the leaders of the Western democracies gathered in Washington to sign the North Atlantic Treaty in April 1949, they shared a common view on the course of developments in Europe since the end of the Second World War. The basic principles upon which NATO was founded derived from a common recognition that:

—the Soviet Union's military threat to the West was genuine and would, for the foreseeable future, likely remain constant;

—U.S. security was inextricably linked to the preservation of freedom, economic prosperity, and democratic values in Western Europe and a return to American isolationism was not feasible; and

—collective security in the form of a formal alliance with an integrated military command offered the best prospect for deterring war and denying the Soviet Union its political objectives in Europe.

In the view of the Committee, the basic premises which led the Western democracies to establish NATO remain valid today. Nonetheless, four decades after NATO was formed, the Alliance continues to be plagued by serious doubts about the collective willingness of its members to fully implement NATO's Flexible Response strategy.

CONTEXT OF THE COMMITTEE'S INQUIRY

At the beginning of the 1st Session of the 100th Congress, the Committee undertook a major initiative to enhance the formulation and articulation of U.S. national security strategy and its military strategy component. This initiative resulted from concerns about the inadequate quality of American strategymaking and the longstanding absence of a clear, coherent, and consistent strategy. The Treaty signed by President Reagan and General Secretary Gorbachev on December 8, 1987, eliminating U.S. and Soviet intermediate-range and shorter-range missiles (INF) provided the Committee with the opportunity to focus its efforts on strategy and capabilities for NATO defense.

On the eve of the Washington summit at which the INF Treaty was signed, the Majority Leader and the Chairmen of the Committees on Foreign Relations, Armed Services, and Intelligence agreed that these three Committees would work together on the Senate's review of the Treaty and that each Committee would provide a report to the Senate within its specific areas of expertise on the Treaty and its ramifications.

The Armed Services Committee's objective has been to establish a broad strategic framework in which the INF Treaty and other critical NATO defense issues could be comprehensively examined. The Committee focused specifically on the requirements for maintaining and strengthening NATO's deterrent posture in the environment brought about by the attainment of an INF Treaty. This review considered NATO strategy, the military balance in Europe, conventional forces improvements, Alliance resource policies, conventional arms control policy, and theater nuclear weapons modernization. The Armed Services Committee also coordinated with the Foreign Relations and Intelligence Committees on specific issues related to details of the Treaty and verification.

As part of its inquiry, the Armed Services Committee conducted 29 hearings on "NATO Defense and the INF Treaty." The Committee's witnesses include the Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Service Chiefs, the Supreme Allied Commander, Europe, and such distinguished outside experts as Dr. James Schlesinger, Dr. Harold Brown, Dr. Henry Kissinger, Dr. Zbigniew Brzezinski, and Ambassador Jeane Kirkpatrick. A complete list of the hearings and witnesses is presented in Appendix A of this report.

After examining the broad issues of NATO defense, the Committee turned its attention to the Treaty itself and devoted substantial effort to establishing an authoritative baseline as to its meaning. The Committee comprehensively reviewed possible ambiguities in the Treaty text and identified an extensive list of questions concerning necessary clarifications. In four days of hearings with Ambassador Glitman, the Chief Negotiator on INF, and his negotiating team, the Committee went through the Treaty on an article-by-article basis and elicited detailed answers to these questions. These sessions included a day-long hearing with Ambassador Glitman on questions related to the negotiating history. In various sections of this report, reference is made to the documents from the negotiating history provided to the Senate by the Administration. It is important to note that the INF Treaty material presented to the Senate by the Department of State consists of a disjointed collection of cables and memoranda of uneven quality. The Senate has not been provided with an official negotiating record. There is no transcript of the proceedings. The material provided to the Senate does not even include a set of documents that compiles all papers shared between the parties.

A brief summary of the INF Treaty is presented in Appendix B.

At the request of the Chairman and Ranking Minority Member of the Committee, former Presidents Richard Nixon, Gerald R. Ford, and Jimmy Carter provided their views to the Committee on the INF Treaty. These letters are included in Appendix C.

The Committee conducted three days of markup meetings on this report, discussing in detail various options for dealing with issues that arose during the hearings. The Committee has incorporated a series of recommendations in this report.

ROLE OF THE COMMITTEE HEARINGS IN THE RATIFICATION PROCESS

On February 9, 1988, the Chairman received a letter from Secretary of State George Shultz which bore directly on the ground rules under which the Committee conducted its hearings. In the letter, Secretary Shultz provided three important assurances with regard to the Senate's constitutional role in providing advice and consent to ratification of the INF Treaty:

> All INF testimony of Executive Branch witnesses, within their authorized scope, is authoritative. We will inform the relevant Committee of any instance in which a witness' testimony is not authoritative in any respect.
>
> Administration testimony and materials for the record can be regarded as authoritative, as described above, without the need for the Senate to incorporate them in its Resolution of Ratification.
>
> The Reagan Administration will in no way depart from the INF Treaty as we are presenting it to the Senate.

The Secretary's letter enabled the Committee to proceed with detailed testimony on the Treaty with the understanding that all Executive Branch testimony and submissions for the record received by the Committee are authoritative representations of the mutual understandings of the Parties and can be relied upon by the Senate in providing its advice and consent to the Treaty, and that the treaty the Senate is being asked to approve is in fact the same treaty that will be respected by the Executive Branch in the future. Although there is disagreement on the Committee, a majority of the Members believe that subsequent letters from the Counsel to the President cast doubt on that understanding. If the matter is not satisfactorily resolved, Members of the Committee may find it necessary to offer appropriate measures during consideration of the Treaty by the Senate, including understandings or amendments to the Treaty.

The Committee provided the Administration with transcripts of the testimony of all Executive branch witnesses. All material provided by the Executive branch for the hearings has been subject to review by the Administration. Except to the extent that certain witnesses advised the Committee that their testimony was not authoritative as to a particular matter, the Administration has not informed the Committee that any Executive branch testimony or material "is not authoritative in any respect." All Administration testimony and materials submitted for the record have been regarded by the Committee as significant, and will form an essential element of the body of evidence before the Senate as it determines whether to give its consent to the proposed Treaty.

NATO MILITARY STRATEGY

The broader context in which the INF Treaty must be considered is principally shaped by two interrelated factors: first, the military strategy that NATO has established for maintaining deterrence and providing defense and second, the capabilities of the Alliance to implement that strategy.

Reacting to the diminished credibility—in an era of strategic nuclear parity—of its previous strategy of "massive retaliation," NATO adopted the military strategy of Flexible Response, including Forward Defense, in 1967. Flexible Response sought to deter any possible aggression by developing and maintaining a full range of military options, incorporated in NATO's triad of conventional, theater nuclear, and strategic nuclear responses. Although committed to a high confidence, initial conventional defense, NATO's strategy explicitly envisions possible escalation to the first use of theater nuclear or strategic nuclear weapons, or both, in the event a Warsaw Pact attack cannot be contained by non-nuclear means.

The Forward Defense component of the strategy means defending West German and other NATO territory as far forward as possible, with the aim of yielding minimum territory during a conflict. Forward Defense is dictated by NATO's limited geographic depth and by the fact that the core of the Alliance in Central Europe is the most exposed to the Warsaw Pact military threat.

Failed Implementation

Although more than two decades have passed since Flexible Response was adopted, the Alliance has failed to implement that strategy effectively, especially because the conventional leg of NATO's triad remains inadequate. Recent Soviet technological advances and continuing conventional force structure increases have compounded NATO's conventional problems. Despite its readily apparent deficiencies in conventional forces, the Alliance has not made significant progress toward the goal of a high confidence, initial conventional defense. As a result, the nuclear threshold remains dangerously low. Moreover, NATO must also worry whether it could sustain an effective conventional defense long enough to permit political authorities to make a determined and deliberate decision to move to a nuclear response.

The second leg of the NATO triad, theater nuclear weapons, has traditionally suffered from limited public and official support. Although Alliance solidarity permitted the INF deployments, the consensus between parties in a number of NATO countries on modernizing theater nuclear forces again appears to be eroding. Only at the strategic nuclear level has the Alliance maintained an adequate force, but Flexible Response sought to move NATO away from an overdependence on strategic nuclear retaliation.

Forward Defense also suffers from ineffective implementation. Beyond failing to improve conventional capabilities enough, NATO has not corrected force maldeployments, strengthened weak corps sectors, or provided for in-place and readily executable terrain barriers. As Admiral Crowe, the Chairman of the Joint Chiefs of Staff, testified before the Committee: "If for some reason war breaks out, maintaining a successful forward defense will be questionable. Our analysis argues strongly that Soviet conventional ground forces will be extremely difficult to contain."

Although Flexible Response remains conceptually sound, the critical gap between the goals of the strategy and the capabilities available to achieve them undermines the utility of the strategy and poses substantial dangers for the Alliance. Military strategists view a strategy with a substantial gap between goals and capabilities as a precept for disaster. Sir Basil Liddell Hart, the eminent British strategist, noted that "strategy depends for success, first and most, on a sound calculation and coordination of the ends and means." NATO strategy does not measure up to this yardstick. Currently NATO has valid goals and sound strategic concepts, but it has failed to develop sufficient capabilities to complete the strategy equation. Should deterrence fail, there are considerable risks that the Alliance's warfighting capabilities may prove inadequate to execute its strategy. The challenge before the Alliance is to provide capabilities to match its goals.

Reasons for Failure

How is it that NATO—whose member states collectively outspend Warsaw Pact countries on defense and have roughly three times the Gross National Product—has been unable to provide sufficient capabilities to implement its military strategy? In part, the answer can be found in an unwillingness to correct current inefficient and national-oriented resource policies. NATO directs a large portion of its defense expenditures into national systems that are often duplicative, non-standardized, and in many cases not even interoperable with other allied systems. During the Committee's hearings, General Galvin, the Supreme Allied Commander, Europe, noted that "while the Warsaw Pact has a great deal of commonality of equipment, NATO has six different main battle tanks, firing four different kinds of ammunition. In the field of communications, NATO has six different systems, none of which are designed to talk to each other."

In part, the answer also reflects NATO's reliance on the American nuclear umbrella and divergent views on equitable sharing of the burdens and risks of common defense which have resulted in an excessive reliance on the early resort to nuclear weapons. Fears of the devastation of a prolonged conventional conflict have fostered risk avoidance policies that preclude developing the conventional capabilities required by Flexible Response. Despite its conceptual elegance, Flexible Response will not be more effectively impemented until a basic agreement on the appropriate risks and responsibilities of each NATO member state is reached.

One fundamental observation about NATO strategy deserves special attention. Notwithstanding the critical need for conventional force improvements, the security of the NATO Alliance will rely on modern and credible nuclear weapons for the foreseeable future. NATO should make this fact absolutely clear to the publics of member nations.

NATO-WARSAW PACT MILITARY BALANCE

The second factor that shapes the broader context in which the INF Treaty must be considered is the comparative capabilities of NATO and Warsaw Pact military forces.

The Committee appreciates the difficulty of assessing the NATO-Warsaw Pact military balance. Just making judgments on the basis of criteria that can be quantified is complex enough. Comparing the capabilities of the two alliances in other more intangible areas is even more challenging. Efforts to assess the balance are further plagued by the failure of NATO and the United States to effectively develop such comparisons, particularly in unclassified form. Nonetheless, through a combination of analytic methods, a rough estimate of the military balance can be reached.

An assessment of the military balance is properly characterized in terms of the comparative capabilities of the NATO and Warsaw Pact alliances to achieve their objectives. Those objectives obviously differ. The strategy, doctrine, and force deployments of the Warsaw Pact continue to emphasize offensive operations designed to cause the collapse of NATO's defenses. On the other hand, the NATO Alliance remains defensive in nature, with an ultimate warfighting objective of restoring the status quo ante. This difference in objectives between the two alliances imposes different demands on their military forces. The success which the forces would likely have in carrying out those different demands essentially determines the military balance in Europe.

Conventional Balance

The imbalance in NATO-Warsaw Pact capabilities is most apparent and most dangerous at the level of conventional forces. NATO has improved its conventional defenses in recent years, but not as fast as the Warsaw Pact has improved its warfighting capabilities. As General Galvin told the Committee: ". . . since 1973, the size of the Soviet military machine facing NATO has grown almost 50 percent, while NATO forces grew little more than 10 percent." Admiral Crowe warned of "an increasingly negative conventional balance, and adverse trends in many of the major weapon categories." The Chairman of the Joint Chiefs of Staff expressed particular concern over the low level of sustainability items and munitions for NATO's conventional defense, declaring: "This trend has, in turn, lowered the nuclear threshold and raised the risk of general escalation."

Perhaps most ominous, the Warsaw Pact has improved its ability to conduct a short-warning, massed armor attack. NATO is especially vulnerable to such an attack, particularly against the Northern Army Group (NORTHAG). There, the strongest forces of the Warsaw Pact (Soviet and East German tank armies in East Germany) are arrayed opposite the weakest sector of NATO's forward defense. The Belgian and Dutch corps that form much of NORTHAG retain most of their personnel and equipment in their home territories. In the event of war, over 60 percent of the Belgian forces and over 85 percent of the Dutch forces must move from their peacetime locations in Belgium and the Netherlands to their defensive positions in West Germany. Moreover, except for one brigade, the three divisions of the U.S. Third Corps, which would reinforce these thin forces in NORTHAG, are stationed in the United States.

NATO Deficiencies

One of NATO's continuing deficiencies is conventional firepower. Dr. Phillip Karber, a well-respected defense analyst, noted in testimony before the Committee that during the past 10 years, the Soviets have added more than 1,000 artillery tubes, 900 tanks, and 1,500 armored personnel carriers in Central Europe. The 10-year net increase in Soviet and other Warsaw Pact conventional weapon systems in the Central Region exceeds the total inventory of such systems in the five and one-third U.S. Army divisions forward deployed in West Germany today.

A second NATO deficiency is sustainability, especially in munitions stocks. Warsaw Pact forces deployed against the Central Region of NATO have more than three million metric tons of ammunition. This ammunition, together with stocks of fuel and supplies, is sufficient to support military operations for 60 to 90 days. In contrast, NATO forces suffer deplorable shortfalls and mismatches of munitions. NATO is far short of its 30-day munitions objective. In shortest supply are "smart" or sophisticated munitions. Moreover, the munitions stocks that NATO has accumulated are unevenly distributed between Army Groups and among national corps. As a result of these problems, the collapse of NATO's conventional defense and escalation to nuclear war could be caused not by a defeat of Alliance forces on the battlefield, but by exhaustion of their conventional munitions.

The ability of NATO to reinforce Central Europe is crucial to its success on the battlefield, particularly in light of firepower and munitions shortfalls. The principal source of reinforcements would be the United States, which has pledged to have in Europe a total of 10 divisions and more than 1,500 tactical aircraft within 10 days. Despite recent improvements in airlift, sealift, and prepositioning of equipment, this commitment cannot be met today. Although the tactical aircraft could rapidly deploy to Europe, their survival is highly questionable in the absence of enough hardened shelters, petroleum storage, and maintenance facilities to service and protect them.

In sum, compared to the Warsaw Pact, NATO suffers from inferior firepower; low levels of sustainability, especially in munitions; inadequate reinforcement rates; and peacetime maldeployment of its forces. NATO's posture is further weakened by the Warsaw Pact's chemical warfighting superiority, which is addressed in a following section.

NATO Advantages

Although its conventional deficiencies make it questionable as to whether NATO will be able to mount a successful conventional defense, the Alliance enjoys advantages over the Warsaw Pact in certain important areas. The overall quality of personnel in NATO's military forces is superior to that of Warsaw Pact personnel. Better training, morale, and leadership should help to mitigate the Alliance's disadvantages.

Another NATO advantage lies in the greater reliability of its member states. The offensive objectives of the Warsaw Pact, together with the coercive nature of relations between the Soviet Union and its partners, cause some uncertainty about the depth of commitment of the East European allies to an offensive operation into Western Europe. Although this difference between the two alliances can be exaggerated and cannot necessarily be relied upon, it represents an important advantage that NATO should attempt to exploit.

A final factor in comparing NATO and Warsaw Pact military capabilities is the quality of major weapons systems. This technological balance is difficult to ascertain. Historically, NATO has relied on the superior quality of its weapons to compensate for its quantitative deficiencies. However, the high cost and prolonged period of time entailed in developing and fielding these sophisticated systems have raised questions about the margin of this qualitative advantage. In addition, the qualitative advantage itself has been eroded by Warsaw Pact progress in certain military technologies.

Assessment

There is considerable risk that NATO forces could be defeated quickly by conventional means. Secretary of Defense Frank Carlucci has argued that "in the event of war in Europe, NATO would face the difficult choice of early escalation to the use of nuclear weapons or suffering a conventional defeat in Europe's critical Central Region." The former Supreme Allied Commander, Europe, General Bernard Rodgers, USA (Retired), has repeatedly pointed out that NATO's conventional weaknesses would force its political authorities to confront this choice between nuclear escalation and conventional defeat in a matter of "days, not weeks" after the outbreak of hostilities.

Such judgments, however, need to be put into perspective. The outcome of a conventional war depends on many unknowns such as the relative performance of competing weapon systems, weather, warning time, and quality of personnel. NATO may have doubts about its capabilities. However, the Warsaw Pact may also have legitimate concerns about the ability to execute its strategy. This strategy calls for attempting to avoid escalation to nuclear weapons by obtaining a quick conventional victory, before the reliability of East European nations is fully tested and before the Soviets might become involved in a 2-front war (i.e., the simultaneous engagement of its large forces near the Chinese border).

Despite these uncertainties on the Warsaw Pact side, NATO cannot afford to assume that the Pact will always be deterred from aggression. NATO must focus on capabilities, not intentions. Major improvements in NATO's conventional capability are required.

Chemical Balance

In 1969, the United States declared a unilateral moratorium on the production of chemical weapons. During the period from 1969 to 1987, when the United States produced no new chemical agents and allowed its existing chemical stockpile to deteriorate, the Soviet Union undertook an extensive buildup of its chemical warfighting capabilities and may now be developing a chemical-biological warfare capability. In doctrine and in practice modern chemical weapons and protective systems are an integral component of Soviet conventional warfighting systems.

In contrast, although progress has been made since the late 1970's the U.S. Armed Forces are far from possessing the weapons delivery capability, equipment and training necessary for fully integrated conventional and chemical warfighting capabilities. Furthermore, the Department of Defense has stated that only 10 percent of the existing stockpile has immediate military utility.

After several years of debate, Congress authorized the production of new binary chemical weapons in the Fiscal Year 1986 Defense Authorization Act. The first binary chemical weapon, the 155mm artillery shell, was certified for production on September 30, 1987. The other binary weapon slated to enter the U.S. arsenal is the deep-strike, persistent-agent, Bigeye chemical bomb, which is not scheduled to achieve full-scale production until 1990. Under existing plans, neither the 155mm shell nor the Bigeye will be deployed in Europe in peacetime. The American and German governments have agreed that all existing military chemical weapons will be removed from Germany by 1992.

Unless the negotiations in Geneva result in a ban on chemical weapons, the Soviet Union and Warsaw Pact will continue for some years to possess a chemical warfighting capability superior to that of the United States and NATO.

Theater Nuclear Balance

The United States initially enjoyed a substantial lead in virtually all areas of theater nuclear weapons, but that lead was eroded by the Soviet Union over time as it developed and deployed comparable weapons systems.

Since 1979, there has been a dramatic increase in Soviet theater nuclear systems. Dr. Phillip Karber noted in testimony to the Committee that in 1979, ". . . the Soviets had no nuclear artillery deployed forward. We had it; they did not . . . Today they have more nuclear artillery in central Europe. . . . than we do. Since 1979 the Soviets have doubled the quantity and range/payload of their in-theater, in-central-Europe nuclear-capable aircraft, so they have roughly twice the number that we do for certified nuclear missions." During this same period of time, NATO has made decisions that have resulted in the retirement of over 2,400 older nuclear weapons from the theater.

NATO has moved, over the past quarter century, from a position of overwhelming superiority in nuclear weapons based in the theater to one of inferiority in those weapons now categorized as "theater nuclear."

ASSESSMENT OF THE INF TREATY

In broad terms, the Committee believes the INF Treaty can make a modest but useful contribution to NATO security. There are a number of positive features of the Treaty, particularly:

—disproportionate Soviet reductions—a precedent which could prove useful in the negotiation of a significant conventional arms reductions agreement;

—on-site inspection on an unprecedented scale; and

—cooperative measures for enhancing verification through national technical means.

At the political level, the Treaty is a triumph for Allied cohesion and coordination. It is also a tribute to the governments in the basing countries which displayed resolve in implementing INF deployments in the face of widespread domestic opposition and skillful Soviet propaganda.

In addition, the Treaty reflects the fruits of continuity in the United States between two successive administrations—one Democratic under President Carter, the other Republican under President Reagan—which, with bipartisan support in Congress, stood steadfastly behind NATO's "dual track" approach.

Military Significance

Nonetheless, unless this Treaty is coupled with a stabilizing and verifiable START agreement, its military significance is, at best, marginal. Every target currently targeted by Soviet shorter-range and intermediate-range systems can be assigned to other Soviet nuclear systems. Such retargeting can be accomplished by strategic systems such as ICBM's, most of which have been tested at INF ranges, and the Yankee-class submarines which have now been redeployed from U.S. coasts to European waters, and intermediate-range systems not covered under the Treaty, such as air-launched or sea-launched cruise missiles (ALCM's and SLCM's). Alternatively, the Soviets could legally develop and deploy a "new type" ground-launched ballistic missile (GLBM) replacement for the SS-20 provided that missile was tested the first time at a range in excess of 5,500 kilometers, even if it were tested on every subsequent occasions at INF ranges.

Verification and Compliance

The Committee received testimony that the Treaty was effectively verifiable, which was described as high confidence that a militarily significant violation would be detected. Such considerations are central to whether this Treaty is in U.S. national security interests, and the Committee accepts this assessment. At the same time, the Committee would object strongly if this proper focus on militarily significant violations were interpreted as a lack of concern over violations that failed to meet this criteria. The Committee wishes to make it clear that violations of this Treaty should not be tolerated, irrespective of their military significance.

During Committee hearings, many Members expressed concern over the record of the Soviet Union's non-compliance with its arms control commitments and the lack of measures taken either to bring the Soviets into compliance or to respond to non-compliance, proportionally or otherwise. Accordingly, the Committee recommends the development of an effective compliance policy as a high priority.

The Committee also supports an expansion of the annual compliance report to include an assessment of the risks posed by the Soviet non-compliance to U.S. national security interests; the measures the United States is taking to bring the Soviets into compliance, as appropriate; and actions necessary to compensate for non-compliance.

In view of the record of Soviet non-compliance with their arms control commitments and the proliferation of systems capable of delivering weapons of mass destruction among Third World nations, the Committee reaffirms its support for the vigorous exploration of Anti-Tactical Ballistic Missile (ATBM) options. Such an initiative, if proven feasible and effective, would provide a safeguard against Soviet use of covertly retained missiles prohibited by the Treaty, as well as providing defense against remaining Soviet short-range ballistic missiles or missiles launched by third parties and protection against accidental missile launches.

The Committee also would support, in separate legislation, an annual report by the President that would set forth a comprehensive arms control strategy; a net assessment of military balance trends, including the effects of arms control; and a description of allied consultations on the security implications of arms control agreements.

Committee Recommendations

On balance, the Committee believes that the positive features of the Treaty outweigh its weaknesses. Moreover, the Committee is convinced, as were the vast majority of witnesses who appeared before the Committee, that were the Senate to reject this Treaty, the adverse political repercussions in Europe and elsewhere would be very significant.

The Armed Services Committee recommends that the INF Treaty be ratified, subject to certain recommendations and possible understandings. These recommendations and possible understandings are outlined in the section which follows.

RECOMMENDATIONS AND POSSIBLE UNDERSTANDINGS ON TREATY ISSUES

1. Article XIV

Article XIV provides: "The Parties shall comply with the Treaty and shall not assume any international obligations or undertakings which would conflict with its provisions." During the Committee's hearings, questions were raised as to whether this provision could be interpreted by the Soviet Union as prohibiting current and future U.S. assistance to our allies on weapons programs not limited under the Treaty on the grounds that such assistance would circumvent the express prohibitions in the Treaty.

The Article-by-Article Analysis transmitted by the President with the Treaty states that Article XIV "does not impose any additional obligations on the Parties, nor does it broaden the interpretation of other obligations in the Treaty." The Analysis adds that this Article merely "reflects the duty of each Party under customary international law to comply with the Treaty."

At the Committee's hearing on February 23, 1988, Ambassador Glitman made the following points in the course of a lengthy description of the negotiating history of Article XIV:

> The Soviets sought . . . to insert into the treaty language which they hoped could serve as either a brake on United States-NATO cooperation or at least as a basis for public accusations that we were not in compliance with the treaty. We resisted that effort. Our success can be measured by comparing the position of the sides during the negotiations with the final result. . . .
>
> [A] look at the relevant articles in SALT II is in order since these form the basis for the Soviet position. Article XII of SALT II states "In order to ensure the viability and effectiveness of this Treaty, each party undertakes not to circumvent the provisions of this treaty through any other state or states or in any other manner". . . .
>
> Article XIII of the SALT [II] treaty states "Each party undertakes not to assume any international obligations which would conflict with this Treaty."
>
> [T]he language of SALT II Article XII is totally absent from Article XIV of the INF Treaty. Thus, it cannot be argued that what was covered by Article XII of SALT II, noncircumvention through any state or states or in any other manner, . . . is covered by Article XIV of the INF Treaty, which is more closely allied to Article XIII of the SALT II Treaty. . . .

Ambassador Glitman made the following observations about the specific Soviet proposals that we rejected:

> [W]e firmly resisted the Soviet approach, and in time, the Soviets dropped the specific prohibitions against transfer of . . . components and related technical documentation. However, they continued to demand general noncircumvention language close to Article XII of SALT II and language parallel with Article XIII of SALT II.
>
> We continued to oppose the noncircumvention language but suggested that if the Soviets dropped the language as well as language they were seeking in another article calling for follow-on negotiations . . . we could accept language which is essentially a restatement of the pacta sunt servanda principle of international law, language similar to Article XIII of SALT II.

* * * * * * *

> In the end, the Soviets agreed to drop all reference to noncircumvention or to other states, and effectively to drop everything that was part of the original Article XIII of SALT II . . .
>
> * * * * * * *
>
> What is left is Article XIV is a restatement of international law. It says that we must comply with the treaty and not assume any new obligations or undertakings that conflict with its provisions. This is well known language. Similar language appears not only in Article XIII of SALT II, but also in Article X of the ABM Treaty and Article VII of the North Atlantic Treaty.

Ambassador Glitman's testimony demonstrated that the Soviets sought to insert language into the Treaty which they hoped would restrict U.S.-NATO cooperation, but the U.S. successfully resisted this effort, and the U.S. view was agreed to by the Parties.

Ambassador Glitman's testimony made it clear that questions as to the type of assistance prohibited under the Treaty must be addressed under the specific prohibitions in the Treaty, not by reference to Article XIV. For example, Articles IV–VI prohibit production or possession of specified INF missiles.

The effect of the Treaty, as Ambassador Glitman has noted, is that: "We cannot produce or possess and thus transfer missiles that fall within the range bands of the Treaty that meet [the Treaty's] criteria." Where there is no limitation in the Treaty on an activity by a Party, however, the Treaty does not prohibit a Party from undertaking that activity in the form of assistance to a third country. Ambassador Glitman illustrated this point with examples of assistance that would not be prohibited by Treaty, such as: production or transfer of lesser components, technology, or blueprints; actions contemplated by the Montebello accord (e.g., follow-on Lance, air-launched systems, and new nuclear artillery); sharing of guidance systems; U.S.-British cooperation in the Trident submarine-launched ballistic system project; and similar existing and future arrangements.

With respect to components of a treaty-limited item, Ambassador Glitman noted: "[T]he Treaty speaks for itself. We can provide components, because that was one of the things they [the Soviets] sought to prohibit." He also noted, however, that transfer of a "whole . . . system piece by piece" would not be permitted.

Recommendation

In light of the explicit assurances contained in the Article-by-Article Analysis and the extensive testimony on this issue by Ambassador Glitman and other Executive Branch officials, which were consistent with the negotiating materials provided to the Senate, the Committee does not believe it is necessary to adopt a condition on the Resolution of Ratification on the meaning and effect of Article XIV.

However, the Committee wishes to state unequivocally its understanding that Article XIV does not in any way constitute a noncircumvention provision, nor does it impose any obligations on the Parties that are not expressed elsewhere in the Treaty. Questions as to the types of assistance prohibited under the Treaty must be addressed under the specific prohibitions in the Treaty, not by reference to Article XIV. The Treaty prohibits the Parties from producing or transferring a missile, missile stage, or launcher for a treaty-limited cruise missile or ballistic missile. It does not prohibit the production or transfer of lesser components or other items, such as guidance elements, technology, or blueprints. However, it would prohibit providing another country with every component piece by piece, thereby effectively amounting to the transfer of a whole missile, missile stage, or launcher.

2. Conventionally-Armed GLCM's

Late in the INF negotiations, the United States reversed its position and agreed to ban conventionally-armed ground launched cruise missiles (GLCM's) of INF range. Former Assistant Secretary of Defense Richard Perle and the other members of the American Enterprise Institute's (AEI) Task Force on INF, among others, recommended that the Treaty be amended to permit such systems.

At the Committee's February 4 hearing, Mr. Perle declared that "the single most serious defect in the Treaty" is the provision (Article II, Paragraph 2) that has the effect of banning conventional GLCM's of INF range. Mr. Perle contended that banning conventional GLCM's "will prevent the United States from deploying weapons that could strengthen greatly our deterrent forces and our conventional capability." Moreover, he maintained that allowing such systems would not make the Treaty less verifiable since he believes the provisions in the agreement permitting unarmed drones and RPV's and defining GLCM range result in the Treaty provisions on GLCM's being already "nearly impossible" to verify. Mr. Perle also stated that this would not be seen by the Soviets as a "killer" amendment and "would, after a suitable interval of plaintive propaganda, be accepted by them."

During the February 25 hearing, Ambassador Nitze provided the following summary explanation for the President's decision:

> Given we have protected ourselves on the air and sea variants, and we had no current requirements for a conventionally-armed INF GLCM, we then had to weigh the potential benefits of protecting this option against the verification difficulties inherent in distinguishing between nuclear and conventionally-armed GLCM's. The U.S. Government had been unable to develop, and the Soviet Union had not put forth, a regime to verify effectively the differences between the two types. Thus, rather than permit Soviet conventionally-armed GLCM's, all the while having to assume for military planning purposes that each Soviet GLCM was capable of delivering nuclear weapons, the President decided to ban all INF GLCM's.

The Joint Chiefs of Staff informed the Committee that a major consideration in their decision to support the ban was the military advantages accruing to the Soviets were they to be afforded the right to deploy conventionally-armed GLCM's of INF range, not only for conventional but also chemical missions. In addition, the JCS emphasized the military potential of alternatives available to the United States to achieve the same target coverage and damage, including ALCM's and SLCM's.

With regard to the verification aspects of this issue, Executive Branch witnesses, including representatives of the Joint Chiefs of Staff, stressed the difficulties that would be introduced if an infrastructure remained for Soviet conventional GLCM operations. These witnesses also cited the intrusiveness, cost, and problematic effectiveness of the verification schemes that would have to be considered if conventional GLCM's were allowed. The witnesses disputed the contention that national technical means of verification could not distinguish between armed and unarmed cruise missiles, pointing to differences in testing patterns and the infrastructures associated with deployments of these types of systems.

Recommendation

The Committee recognizes the validity of the concerns expressed during its hearings over the prohibition of a potentially promising option for implementing NATO's follow-on forces (FOFA) and deep strike doctrines. Advanced technology is the Alliance's trump card, and highly-accurate, unmanned, long-range, stand-off weapons represent a particularly attractive means for redressing the conventional imbalance in Europe.

At the same time, the Committee regards the proposal to permit conventional GLCM's as a two-edged sword, since it would provide the Soviet Union with a readily exploitable option for increasing its conventional and chemical threat to vital NATO facilities in Western Europe. In addition, the Committee recognizes the magnitude of the verification problem that would be created were the Soviets to deploy conventional GLCM's of INF range. The Committee concludes that the verification question was a principal factor in the Administration's willingness to ban conventional GLCM's.

The negotiating records provided to the Senate indicated that the Soviet Union's opposition to allowing conventionally-armed GLCM's was consistent and forceful. Neither the negotiating records provided to the Senate nor the Administration's testimony on this point provides grounds for concluding that amending the Treaty in this manner would not prompt a protracted and, at best, difficult renegotiation of the agreement.

In the final analysis, the Committee does not believe that an amendment to permit conventional GLCM's of INF range is advisable. However, banning the deployment of such systems makes it essential that START not foreclose U.S. options for conventional ALCM's and SLCM's, including systems of these types for INF ranges. The Committee urges the Administration not to permit the GLCM decision to set a precedent that could adversely affect U.S. national security interests with regard to conventional ALCM's and SLCM's.

3. Futuristic Weapons Systems

During the Committee hearings, serious concerns were raised that the Treaty is not clear in its application to future types of weapons, such as an unmanned hypersonic boost-glide vehicle.

Article II defines "ballistic missile" as "a missile that has a ballistic trajectory over most of its flight path." The term "cruise missile" is defined as "an unmanned, self-propelled vehicle that sustains flight through the use of aerodynamic lift over most of its flight path." Both GLBM and GLCM are further defined as a "weapon-delivery vehicle."

Despite repeated questioning by the Committee, the Administration would not answer the specific questions of whether a boost-guide vehicle should be categorized as a cruise missile or a ballistic missile. Ambassador Glitman testified that that judgment could not be made without knowing the specific features of the system: "I have to know what that vehicle you have mentioned is, and I do not." Ambassador Glitman also stated, however, that if a boost-glide vehicle or any other system meets the four criteria established for inclusion in the Treaty (range, weapons delivery, ground-launched, and ballistic or cruise), then "it will be covered by the Treaty."

However, a more fundamental, and potentially serious, issue arose during the hearings as to the meaning of the words "weapon-delivery" in Article II. The Article-by-Article Analysis defines this term as "those types of ground-launched cruise missiles that have been . . . flight-tested or deployed with any type of warhead device or simulation thereof." This suggests that GLBM's or GLCM's which destroyed their targets through other, perhaps more futuristic or exotic, means would not be covered. If this reading is correct, then, the Treaty would appear to allow GLBM's or GLCM's that destroyed targets through such means as lasers, particle-beam generators, microwave pulse generators or perhaps even direct impact (kinetic kill).

During the hearings, however, there were indications that the Administration may be interpreting this language more broadly than the explanation in the Article-by-Article Analysis to include future weapons types such as those listed above (i.e., anything that can destroy a target). The Committee has not, however, received final authoritative testimony on this point. The Administration has informed the Committee that it is endeavoring to come up with an answer to this question but is not yet in a position to do so.

Recommendation

The Committee believes this is a critical issue. Most of the attention on the INF Treaty has focused on the elimination of existing systems over the next three years. However, the Committee believes it is important that the Senate recognize that the Treaty is also establishing a permanent ban on certain types of weapons—nuclear and conventional. For this reason, the Senate must insist that the Treaty be very clear in defining which types of future weapons of INF range will and will not be allowed.

The committee recommends that the Senate insist that the Administration tell it authoritatively (1) what they think the definition of "weapon-delivery" is and (2) whether this definition was clearly agreed to by the Soviet Union.

If the Administration cannot demonstrate to the Senate's satisfaction, before the final floor vote on advice and consent, that the United States and the Soviet Union reached a clear understanding on this question, then the Committee recommends the adoption of an appropriate understanding to provide a clear statement of the U.S. position on the scope of the phrase "weapon-delivery." If the Administration should report to the Senate that there is no common understanding between the U.S. and Soviet negotiators on this question, the Senate should, before propounding an understanding on this issue, receive the views of the Administration on how to define "flight-tested or deployed for weapon delivery."

4. SS-25/SS-20 Second Stage Correlation

Article VI, Paragraph 2 reads:

> Notwithstanding paragraph 1 of this Article, each Party shall have the right to produce a type of GLBM not limited by this Treaty which uses a stage which is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range GLBM having more than one stage, providing that that Party does not produce any other stage which is outwardly similar to, but not interchangeable with, any other stage of an existing type of intermediate-range GLBM. (emphasis added)

During the Committee hearings, concern was raised as to whether this provision contains a double negative which would permit the Soviets to produce an ICBM that had one stage which is outwardly similar to, but not interchangeable with, a stage of the SS-20 and another stage that was outwardly similar to and interchangeable with another stage of the SS-20. Since a stage that was outwardly similar to and interchangeable with an SS-20 stage would for all intents and purposes be an SS-20 stage, the issue is whether the prefatory language in this provision (which reads "[n]otwithstanding paragraph 1 of this Article") in combination with the drafting error would allow the Soviets to retain SS-20 stages despite the provisions in the Treaty requiring their complete elimination.

The Article-by-Article Analysis states that this provision was necessary because of the "outward physical similarity between the first stage of the SS-25 intercontinental ballistic missile (ICBM) and the first stage of the SS-20." It states that "the effect of Paragraph 2 is to make clear that the Treaty does not prohibit the Soviets from continuing to produce the SS-25 ICBM, which is not limited by this Treaty, on the basis that it has a first stage outwardly similar to, but not interchangeable with, the first stage of the SS-20."

Under the Treaty, the United States has a reciprocal right with regard to one stage of a non-INF U.S. missile (either an ICBM or a short-range nuclear force (SNF) missile) being outwardly similar to, but not interchangeable with, the Pershing II missile system, should it choose to exercise that right.

During the Committee hearings, Ambassador Glitman testified that the United States was not "seeking to capture" the SS-25's and "concluded that we could provide an exception for the SS-25." He further testified that this paragraph permits the Soviets to build a first stage of the SS-25 which is outwardly similar to, but not interchangeable with, the first stage of the SS-20 stage. He insisted, however, that the provision would not allow the Soviets to build both a first and a second stage of the SS-25 that are outwardly similar to, but not interchangeable with, the first and second stages of the SS-20.

Notwithstanding Ambassador Glitman's testimony as to the intent of the Parties and the effect of the Treaty, Members expressed the view that the provision was, at best, awkwardly written, and, at worst, contained a double negative that, in combination with the exemption stated in the prefatory clause, would allow production not only of a first SS-25 stage that was outwardly similar to, but not interchangeable with, the first stage of the SS-20, but also a second stage of the SS-25 that could be outwardly similar to and interchangeable with the second stage of the SS-20.

Recommendation

The Committee carefully weighed the testimony of Ambassador Glitman, the description contained in the Article-by-Article Analysis, and pertinent documents from the negotiating history. The Committee concluded that there was a meeting of the minds between the United States and Soviet negotiators that each Party has the right to produce a type of GLBM not limited by the Treaty if that missile uses one, but only one, stage which is outwardly similar to, but not interchangeable with, any stage of an existing type of intermediate-range GLBM. Thus, if a Party chooses to produce a non-INF GLBM with one such stage, it may not produce any other stage that is outwardly similar to any other stage of an INF missile.

This means that the Soviets may continue producing the SS-25 first stage provided that it is outwardly similar to, but not interchangeable with, the first stage of the SS-20. If these stages are interchangeable, that would be a violation. However, if they elect this option (as they have indicated they will), the second stage of the SS-25 cannot be outwardly similar to the second stage of the SS-20, even if it is not interchangeable.

Although the Committee believes that the United States and the Soviet Union share a common understanding of the meaning and effect of this provision, it firmly believes that the drafting of this provision is technically flawed and should be clarified. Accordingly, the Committee urges the President to clarify with the Soviet Union the meaning of this provision. This could be accomplished, for example, by an exchange of letters.

The Committee further urges the President to reach this clarification prior to final Senate action on the Treaty. If such clarification is not reached, the Committee may have to recommend that an understanding be added to the Resolution of Ratification to clarify this provision.

5. Definition of Range of INF Missiles

During the hearings, concern was expressed that the Soviets could develop and deploy a "new type" GLBM to replace the SS-20's if the missile were tested the first time at a range in excess of 5,500 km, even if every other test were at INF ranges. The Committee considered whether the Treaty should be changed to deal with this problem.

During its hearings, Ambassador Glitman testified that a new type GLBM that had been tested once at a range above 5,500 kilometers could be deployed without violating the Treaty, even if all subsequent tests were conducted at INF ranges. The Committee was subsequently informed that conflicting testimony may have been presented by another Executive Branch witness before another committee. The Committee sought clarification of this conflict and received a letter, dated March 25, from J. Edward Fox, Assistant Secretary of State for Legislative Affairs, which explained that:

> The range capability of a GLBM is "considered to be the maximum range to which it has been tested." Thus once a missile has demonstrated in a test that it has a strategic range capability, it must be considered to be a strategic system. However, if the test to strategic range was with a configuration (booster stages, post boost vehicle, RV's) that is unlike that used for remaining tests of the system at INF ranges, the configuration tested to INF ranges would be considered a new missile in the INF range and prohibited by the Treaty. On the other hand, a GLBM tested to ICBM ranges and then tested to INF ranges in the same configuration clearly would not be limited by the Treaty.

However, concerns were raised in the Committee: (1) as to whether the letter related directly to the testimony in question; (2) the authoritativeness of the letter; and (3) the substantive basis for the apparent contention in the letter that a change in the number of reentry vehicles (RV's) on a missile can make it a "new type." The Committee is seeking further clarification on this issue.

The United States proposed 5,500 km as the upper limit for the definition of intermediate range missiles very early in the negotiations. It was accepted immediately by the Soviets and, according to the United States' negotiators, never became an issue between the Parties. The negotiators have assured the Committee that it was well-understood by both Parties that any missile tested only once over 5,500 km was not an INF range missile and not subject to the Treaty.

In response to a question as to why the Treaty adopted this definitional approach, Ambassador Glitman testified that the Parties decided that if a missile could "go a strategic range we are going to count it as a strategic missile" and not subject to this Treaty. Ambassador Glitman also maintained that "the political impact of that missile changes, because it is no longer a unique INF missile 'aimed' at Europe or Asia. It is now a missile which is capable of reaching the United States."

The opportunities for circumventing the Treaty's INF range also include the option permitted the Soviets under the Treaty to retarget existing or new ICBM systems to strike targets in Europe and Asia that had previously been targeted by the SS-20's. Because they could legally test them extensively at INF ranges, the Soviets could have a high degree of confidence in the military utility of these missiles.

Any ICBM's that were given INF targets could, however, detract somewhat from the total Soviet inventory of weapons assigned against the United States. This trade-off would, of course, be more limiting on the Soviets in the context of a START agreement, depending upon the terms of such an agreement. As Ambassador Glitman testified, the military effectiveness of the INF Treaty "would be greatly enhanced by a follow-on START Treaty."

In addressing this issue, the Committee considered recommending amendment of the Treaty to specify that a missile which had been tested on one or more occasions at INF ranges would only be exempted if the number of tests conducted at ranges over 5,500 km exceeded a certain percentage of the system's total flight test program (e.g., 50 percent).

If consistently applied, however, such a rule would have the disadvantageous effect of creating a circumvention problem involving missiles of *less than* INF ranges. One of the advantages of the current range definition approach taken in the Treaty is that if the Soviets were to test an SNF missile on even one occasion at a range above 500 kilometers, it would no longer be considered an SNF system but rather an INF system. All SNF missiles of that type would then be banned under the Treaty. If the Treaty were amended to specify that INF range would be determined by a percentage of testing rule as discussed above, then the Soviets could conduct extensive testing of SNF missiles at INF range and not have them count as INF missiles, provided the testing at INF ranges was less than that percentage of all tests of this missile type.

Recommendation

The Committee carefully reviewed the pros and cons of recommending changes to the Treaty's definitional approach in this area. The Committee determined that this approach was not inadvertent and that both Parties understand that if first tested over 5,500 km, the missile would be exempted from coverage under the Treaty. This underscores the need for achieving a stabilizing and verifiable START accord.

The Committee saw some appeal to amending the Treaty to restrict INF circumvention options using strategic systems. However, such amendments have liabilities of their own and would require re-negotiation with the Soviets. On balance, therefore, the Committee decided not to recommend a change in these provisions of the Treaty.

However, the Committee remains concerned about the issues discussed above with regard to the letter from Assistant Secretary Fox. Unless satisfactorily resolved, the Committee may need to recommend an appropriate measure during consideration of the Treaty by the full Senate.

6. GLCM Range Definition

During the hearings, several witnesses criticized as ineffective the definition of cruise missile range contained in Paragraph 4 of Article VII ("the maximum distance which can be covered by the missile in its standard design mode flying until fuel exhaustion"). Concern was expressed over the U.S. decision not to insist on its original proposal for defining GLCM range.

The language of Article VII, Paragraph 4 was carried over from Article II, Paragraph 8 of the SALT II Treaty. However, the Carter Administration's Article-by-Article Analysis of the SALT II Treaty noted that during the negotiations the United States proposed, and the Soviet Union rejected, clarifying language dealing with cruise missiles which had been tested without exhausting their fuel. This language would have provided that in those cases in which the cruise missile flying a standard profile had not exhausted its fuel, the Parties would assume that the remaining fuel would be used by continuing to fly at the same altitude and speed at which the cruise missile was flying in the last segment of flight. As in the case of SALT II, the INF Treaty does not contain clarifying language of this nature.

However, even if the Parties had clarified the meaning of these words during the INF negotiations, a GLCM that had been confirmed with 100 percent confidence not to have been tested above the 500 kilometer INF range threshold could still be given an INF range capability at any time by exchanging the existing warhead for a lighter warhead. The Party could not, however, test the missile with the lighter warhead at INF ranges without violating the Treaty.

Recommendation

The Committee reluctantly recommended that the Senate accept the GLCM range definition currently contained in the Treaty. The Committee is deeply disappointed that the Administration did not succeed in getting the Soviets to accept the more effective U.S. definition. This unfortunate reality, however, underscores that an amendment by the Senate would require an uncertain and likely protracted renegotiation with the Soviet Union.

Despite the weaknesses of the GLCM range definition, it is the position of the Administration that the definition will provide the United States with a basis for challenging suspended violations of the GLCM range limitation. Accordingly, the Committee recommends that the U.S. intelligence community assign high priority to monitoring Soviet cruise missile tests and that the Executive Branch react forcefully, through the Special Verification Commission or other appropriate diplomatic channels, if presented with indications of possible Soviet efforts to circumvent this restriction.

In addition, the Committeee recommends that should the United States and the Soviet Union reach an understanding in the START negotiations on a more effective definition of cruise missile range, agreement should be sought on incorporating the definition retroactively into the INF Treaty in the form of an amendment or protocol, subject to Senate consent.

7. West German Pershing IA Missiles

During its hearings, the Committee examined whether there are any grounds under which the Soviet Union could reasonably argue that the INF Treaty limits the Federal Republic of Germany's (FRG) Pershing IA missiles.

The Treaty does not mention the FRG P-IA's. However, Paragraph 9, Section II of the Protocol on Elimination states: "During the last fifteen days, a Party shall withdraw to its national territory reentry vehicles which, by unilateral decision, have been released from existing programs of cooperation and eliminate them during the same timeframe in accordance with the procedures set forth in this Section."

The Article-by-Article Analysis contains the following:

On August 26, 1987, the Federal Republic of Germany announced that it would dismantle its Pershing IA missiles when the United States and the Soviet Union had eliminated all of their intermediate-range and shorter-range missiles pursuant to the Treaty. This unilateral decision by the Federal Republic is completely separate from the Treaty. This decision represents a policy of the Federal Republic of Germany that is not legally binding upon the Parties to the Treaty.

In testimony before the Committee, Ambassador Glitman stated: "When the program of cooperation ends, those front ends which belong to us become subject to the treaty. That is what this paragraph is saying. We are obliged to eliminate them as we would any other front end. What happens to the rest of that missile is up to the Federal Republic of Germany."

The negotiating records provided to the Senate did not reveal statements inconsistent with the Treaty text, the Article-by-Article Analysis, or the testimony of Ambassador Glitman.

Recommendation

In light of the assurances communicated to the Senate through the Article-by-Article Analysis and Ambassador Glitman's testimony, the Committee sees no need to adopt an understanding clarifying this issue.

8. Nondestruction of Warheads

The INF Treaty does not require the elimination of the nuclear warhead devices and guidance elements associated with INF missiles. As a result, the Treaty permits the nuclear warhead devices associated with INF missiles to be modified and redeployed on other weapons. During the hearings, concerns were raised as to whether the Treaty should have required the elimination of these nuclear devices.

The Article-by-Article Analysis provides the following explanation for not requiring the elimination of nuclear warhead devices and guidance elements:

> Nuclear warhead devices and guidance elements are not required to be eliminated because destroying them would be meaningless unless the manufacture of new such items was also prohibited. Also, since warheads are small, verifying compliance, with such a prohibition would be extremely difficult. Furthermore, the retention of the fissionable material from the warheads conserves resources necessary to U.S. national security.

During the hearings, the Administration testified that in order to verify the destruction of nuclear warhead devices, both sides would have to share extremely sensitive and highly classified information about the technology of the physics package contained in the warhead.

Recommendation

The Committee recommends that the Treaty provisions dealing with the disposition of nuclear warhead devices associated with INF missiles not be changed.

9. Retention of SS-20 Chassis

This issue concerns whether there is an unequal and/or unverifiable aspect of the elimination provisions for certain intermediate-range missile launchers. Under the Treaty, the procedures for eliminating SS-20 launchers will allow the Soviets to retain these vehicles for other purposes, such as transporting or laying pipes. The Treaty procedures for eliminating Pershing II launchers will effectively render the trailer containing the missile erector-launcher unusable for any purpose, although the United States can retain the truck which pulls the trailer.

The Treaty requires each Party to cut the erector-launcher mechanisms for both the Pershing II and the SS-20 into two pieces, thereby rendering that part of the launcher inoperable. In the case of the Pershing II, the erector-launcher is an integral part of a trailer which is towed by a M.A.N. truck. This trailer, including the erector-launcher, will be cut in half between the front and the rear axles. However, the U.S. can unhook the M.A.N. truck (which is a vehicle common to U.S. and allied forces) and use it for other purposes.

Because the design of the SS-20 launcher does not involve a detachable truck and a separate trailer but rather constitutes a single, integrated unit, the Soviets argued that they would receive unequal treatment under the Treaty if the U.S. were allowed to retain the M.A.N. truck while the entire SS-20 launcher had to be eliminated. The solution incorporated in the Treaty is to require the Soviets to remove and cut in half the erector-launcher which is bolted to the back of the chassis, remove the mounting bolts, and cut off the last .78 meters of the chassis, which contains the leveling supports for the launcher and the mechanism for elevating the erector-launcher.

During the February 23 hearing, Mr. Bartek, who headed the U.S. working group on the Protocol on Elimination, explained the effect of these procedures:

> It was clear to us that by so doing, cutting as much of that trailer off as we could, we would eliminate this vehicle as a launcher because it could not accommodate either the erector launcher mechanism or a missile. It would therefore be too short to accommodate a missile and would forever lack the structural integrity to accommodate this erector launcher mechanism and an erect missile. It could not be welded back or fastened back in any way that would provide you the structural integrity to accommodate that launcher, erector launcher mechanism and an erect missile. It was a completely reciprocal arrangement under which we drive our truck away, they drive their truck away. The launchers, however, of both sides are eliminated.

During the hearings, concern was expressed that since these modified SS-20 chassis will be allowed to move freely throughout the Soviet Union (perhaps with large pipes overhanging the rear end of the vehicle), the United States might not be able to determine with confidence if a particular vehicle was in fact a prohibited SS-20 launcher. The AEI Report recommended, inter alia, that the Treaty "be amended to provide for cutting chassis for such missiles into equal segments (not at assemble points) as is required for other systems."

This issue is further complicated because the Soviets could declare that some launchers listed on the November 1987 data exchange had been "eliminated" after the Treaty was signed but before it goes into effect and would therefore not be included in the updated data exchange required 30 days after the Treaty enters into force. Concern was raised that the Soviets could move these launchers away from declared INF areas thus preventing on-site inspection, and we would have no guarantee that the elimination procedures had been carried out. Another hypothetical cheating scenario involves a calculated Soviet decision to covertly maintain SS-20 launchers which were never declared in the MOU and operate them disguised as modified SS-20 launcher pipelayers.

Recommendation

An amendment along the lines of that suggested in the AEI report would make it virtually impossible for the Soviets to convert "eliminated" SS-20 launchers back into operational SS-20 launchers and it would preclude the possibility of SS-20 launchers roaming in the field in the guise of pipelaying vehicles. Nonetheless, such an amendment, if successfully renegotiated with the Soviet Union, would not prevent them from covertly stockpiling intact SS-20 launchers which had either been falsely declared to have been eliminated during the period between the signing of the Treaty and its entry into force or never declared in the first place.

The Committee recognizes that the SS-20 launcher elimination procedure specified in the Treaty complicates the monitoring tasks confronting the United States. However, with or without such an amendment, the effectiveness of the Treaty's verification regime will still depend in the final analysis upon a Soviet calculation that prohibited systems would not be militarily viable due to the ban on flight testing, and/or that the political risks of detected cheating outweigh the military benefits of covertly conducting prohibited activities. Accordingly, the Committee does not recommend an amendment to the SS-20 launcher elimination procedures contained in the Protocol.

10. SS-20 Elimination Launches

Article X, Paragraph 5 of the Treaty gives each Party the right to eliminate by launching, during the first six months of the Treaty, up to 100 intermediate-range missiles. The Soviets insisted upon this right, citing concerns about possible damage to the environment were the Treaty to require all the missiles to be burned during the three year elimination period.

During the Committee hearings, a concern was raised about whether or not the Soviets might be able to gather sufficient reliability data using these launches to have confidence that a covert force would remain reliable, and therefore militarily significant.

If the Soviets were able to achieve confidence in a covert SS-20 force in this manner, the argument that the Soviets would have little incentive to cheat because of the ban on flight testing becomes, less valid. Furthermore, it is argued that flight tests of the SS-25 will provide the Soviets some data relevent to the SS-20 because the first stages of the two missiles are nearly identical. Thus, if the Soviets can achieve a reasonable degree of confidence in the reliability of the SS-20 through elimination launches for the first six months after the Treaty enters into force, and if this time ban be extended by surrogate testing through the SS-25, then a covert force becomes more attractive to the Soviets and their incentive to cheat will be higher.

In response to a question submitted during the Committee hearings, the Administration replied:

> It is our judgment, given that launch to destroy (LTD) is limited to 100 missiles in the first six months and the fact that the Soviets have had over 10 years to train and can continue to do so right up to elimination, that these six months of LTD would not contribute significantly to the reliability of a covert force.

The Committee also took note of Section III of the Protocol on Elimination, which includes a number of limitations on either Party's ability to use elimination launches for other purposes, including testing missile reliability. For example, the section provides, "Neither Party shall transmit or recover data from missiles being eliminated by means of launching except for unencrypted data used for range safety purposes." The section also provides that the elimination launches "shall be subject to on-site inspection."

Recommendation

The Committees does not believe it is necessary to recommend any changes to the provisions in the Treaty pertaining to elimination launches.

11. Amendments to the Protocols

Amendments to the INF Treaty generally require the advice and consent of the Senate, but certain changes may be made in the Protocols without the Senate's consent. At the Committee's hearings, questions were raised as to what types of changes could be made without the approval of the Senate.

Once the Treaty enters into force, amendments to the Treaty can be made only with the consent of the Senate (Article XVI and XVII). However, the Protocols permit changes without a treaty amendment on "such measures as may be necessary to improve the viability and effectiveness" of the Protocols. The Article-by-Article Analysis describes such modifications to the Protocols as "technical changes."

At the Committee's hearing on February 23, 1988, Ambassador Glitman assured the Committee that the procedure for such technical changes applies only to the Protocols and cannot be used to alter any other provision of the Treaty.

With respect to changes in the Protocols, he was asked to describe the difference between a "technical" change (i.e., one that can be accomplished without the Senate's consent) and other changes to the Protocols (which require an amendment to the Protocols and the Senate's consent). He responded: "The question is [Whether] you have changed a substantive obligation under the Treaty, and such a change under the Treaty would clearly require an amendment." He added: "We are going to have to work with the . . . the Congress to ensure in the future that if there are changes, Congress will know that they are on their way and that they are either technical or a major obligational change." He confirmed that changes made without the consent of the Senate would be reported to Congress under the Case Act.

Ambassador Glitman assured the Committee that, with the exception of "technical" modifications to the Protocols, the Executive Branch, without the approval of the Senate, cannot modify the Protocols or adopt a meaning for any provision of the Treaty in a manner that is contrary to or inconsistent with the meaning of the Treaty as presented to the Senate.

Recommendation

In light of Ambassador Glitman's assurances to the Committee and the statements in the Article-by-Article Analysis, the Committee sees to need to recommend an understanding to the Resolution of Ratification clarifying protocol amendment procedures.

12. Force Majeure

Under Section X of the Inspection Protocol, "[a]n inspection shall be cancelled if, due to circumstances brought about by force majeure, it cannot be carried out." During the Committee's hearings, a question was raised as to the meaning and effect of this provision.

The Inspection Protocol has specific limits on the number and timing of inspections. Under the Protocol, the option of cancel an inspection rests only with the inspecting party. The force majeure provision is designed to account for circumstances when cancellation is required by circumstances beyond the control of the parties.

The Article-by-Article Analysis states that the term "force majeure" means a " 'superior or irresistible force' outside the control of the Parties that could not be avoided by the exercise of due care." In response to a question from the Committee as to the meaning of this term under international law, the Administration set forth the same definition contained in the Analysis, and gave as an example "a condition that would exist if, for example, a flood or earthquake blocked an inspection."

Ambassador Glitman, in testimony before the Committee, confirmed that no condition other than a "superior or irresistible force" (i.e., acts of God) would provide grounds for an Inspecting Party to cancel an inspection. The Administration also advised the Committee that "were it to appear that the Soviets were willfully delaying or obstructing our inspection access, we would pursue such a matter vigorously in the Special Verification Commission and any appropriate channels."

Recommendation

The Committee believes that by defining the term "force majeure" in terms of its accepted meaning under international law, the Parties will be able to avoid unnecessary misunderstandings and accusations of noncompliance that may surface when there is a cancellation of an inspection. Based on the Administration's submissions to the Committee, there is no need to adopt a condition on the Resolution of Ratification on the meaning and effect of the term "force majeure."

13. Destroying SS-20's in Their Canisters

Section II, para 10, of the Elimination Protocol allows the Soviet Union to eliminate the SS-20 by "explosive demolition of the missile in its launch canister or by burning missile stages." Concern was raised during the Committee hearings as to whether the Soviets would be able to eliminate a complete missile system inside its launch canister, unseen by U.S. inspectors.

In no other provision of the Treaty is a Party allowed to destroy a missile inside a launch canister. However, a provision does exist in Section II, paragraph 6, of the Elimination Protocol which states:

> Immediately prior to the initiation of the elimination procedures set forth in paragraph 10 of this Section, an inspector from the Party receiving the pertinent notification required by paragraph 5(c) of Article IX of the Treaty shall confirm and record the type and number of items of missile systems, listed in paragraph 1 of this Section, which are to be eliminated. If the inspecting Party deems it necessary, this shall include a visual inspection of the contents of launch canisters.

The first sentence of the above paragraph from the Elimination Protocol applies to all systems listed in paragraph 10, Section II of Protocol. Since the SS-20 will remained sealed in its launch canister, U.S. inspectors will be unable to confirm and record the missile being eliminated unless the inspecting party invokes its rights to examine the interior of the launch canister as provided for in Section II, paragraph 6, of the Elimination Protocol. The second sentence is designed to address the problem of confirming the contents of an SS-20 launch canister if it is deemed necessary.

While the elimination procedure identified for the SS-20 in Section II, paragraph 10 was not the preferred choice of U.S. negotiators, the right to inspect inside a canister before an SS-20 is eliminated will probably provide some deterrent value to Soviet noncompliance with this elimination right. However, the provision in Section II, paragraph 6, that requires an inspector from a Party to "confirm and record the type and number of items of missile systems" being eliminated will not be adequate in the case of the SS-20 unless we invoke our right to under Section II, paragraph 6 of the Elimination Protocol to inspect the inside of the canister.

No provision is made in this Section of the Treaty for exterior equipment to confirm that the contents of the SS-20 canister contains a missile. This is of particular importance since a complete SS-20 missile will never be destroyed outside of a canister according to the terms of the Elimination Protocol. Consequently, a requirement that our inspectors examine all of the SS-20 launch canisters may deter cheating while increasing our confidence to verify the identity of the missile scheduled for elimination.

Recommendation

The Committee strongly recommends that the Administration require U.S. inspectors to inspect the interior of all SS-20 canisters so that they can "confirm and record the type and number of items of missiles systems" being eliminated since it cannot be done by external observation of the launch canister.

14. Suspect-site Inspections

The negotiating records provided to the Senate reveal that the term "suspect-site inspections" was used to describe various types of inspection regimes. In some cases, the term meant "anywhere anytime" inspections. In other cases, the term meant inspections of facilities not identified in an MOU but which could produce military related equipment, for example, systems prohibited by the terms of the INF Treaty. At other times, the phrase is used to describe monitoring activities not associated with the two types of inspections listed above. In the final version of the INF Treaty, Article XI provides for on-site inspections rights but no provision exists for short-notice, on-site suspect site inspections.

While the issue of suspect site inspection was discussed thoroughly during the course of the negotiations on the Treaty, the provision was apparently dropped late in the negotiations. Some arms control experts argue, however, that a START Treaty should have a true suspect site provision such as a "short-notice challenge" or "anywhere anytime" inspection procedure. The Senate Select Committee on Intelligence stated in its report on the INF Treaty that monitoring and verifying compliance with be much more difficult under a START agreement. Moreover, according to the Intelligence Committee report, INF verification provisions are a useful precedent but not adequate for START.

During the Committee's hearings on the INF Treaty, many witnesses and Committee members also expressed the sentiment that while the verification provisions of the Treaty were a useful and unprecedented achievement in the history of the arms control process, they would not be adequate for monitoring a START Treaty. Consequently, the concern surfaced within the Committee over the possibility of no short-notice, anywhere-anytime, suspect-site inspections for START.

Recommendation

Noting the increased difficulty of monitoring a potential START agreement as opposed to the INF Treaty, the Committee recommends that the Administration examine seriously the question of whether short-notice, suspect-site inspections should be included as a verification feature of a START Treaty. The Committee endorses, and urges U.S. and Soviet negotiators in Geneva to follow through on, the statement on START verification principles in the U.S./Soviet communique of the December 1987 Washington Summit, which reads:

> As priority tasks, they should focus on the following issues: . . . The right to implement, in accordance with agreed-upon procedures, short-notice inspections at locations where either side considers covert deployment, production, storage or repair of strategic offensive arms could be occurring.

15. Monitoring the Votkinsk Machine Building Plant

Section IX, paragraph 14(c), of the Inspection Protocol states that the inspecting Party shall have the right ". . . to image the contents of any launch canister or of any shipping container declared to contain such a missile or missile stage." The negotiating record is not entirely clear on what is meant by the term "image." It is assumed that x-raying would be an allowed inspection right.

Other than x-raying, the term "image" is not expanded upon in the Treaty text, article-by-article analysis, or negotiating records provided to the Senate. Moreover, even in some of these documents—for example, the negotiating records—our rights with respect to x-raying are not clearly defined.

The Committee expressed and interest in seeking clarification as to the type of equipment and procedures that will be used to implement this right under the Inspection Protocol. In response to a written question submitted by the Committee, the Administration stated: " 'The non-damaging image producing equipment' referred to in paragraph 6 [of Section IX] is essentially a large fixed imaging machine that will be used pursuant to paragraph 14(c) of Section IX to 'image the contents of any launch canister' exiting the portals to Votkinsk that is declared to contain a missile as large or larger than or heavier than an SS-20."

The Committee also understands that these technical issues and procedures are currently under discussion between the two Parties. We also understand that the agency involved in these talks is the On-Site Inspections Agency (OSIA).

Recommendation

The Committee recommended that it receive a report on the status of on-going (OSIA) talks between the two Parties. Specifically, the Committee asked for a report on the disposition of Section IX, paragraph 14(c), of the Inspection Protocol, on the procedures and technology that will be used to "image" launch canisters and shipping containers declared to contain a missile or missile stage covered by the terms of the Treaty. The Committee also asked for an assessment of our confidence with respect to the ability of the imaging equipment to accurately assess and discriminate the Treaty-related items enclosed in launch canisters and shipping containers.

In response to this request, the OSIA has agreed to supply the Committee a report on the status of the on-going talks regarding this issue.

NATO IN THE POST-INF ENVIRONMENT

Whether history judges the INF Treaty to have made a positive or a negative contribution to the defense of Europe will depend ultimately on which road the Alliance chooses to travel at this critical juncture. One NATO road leads backward down a slippery slope to European denuclearization, American disengagement, and Soviet domination. The other NATO road leads forward to the solid ground of solidarity, stability, and security.

The "slippery slope road" is marked with several warning signals:

> A growing nuclear allergy in the West, while NATO continues to rely on early use of nuclear weapons in response to a non-nuclear attack.

Changing public attitudes in Western Europe toward the United States and the Soviet Union, due in large part to an aggressive propaganda campaign by a vigorous Soviet leadership.

U.S. and European fiscal and budget realities.

NATO's reluctance to think boldly in the area of conventional arms control.

A continuing failure of political will in getting the most out of the Alliance's collective defense resources.

If these warnings are viewed as trends that need to be reversed rather than as milestones on a one-way road to the Alliance's ultimate demise, NATO can persevere. The roadmap to firm, level ground requires a muiti-track approach.

The first track requires NATO to assign the highest priority to eliminating its critical conventional warfighting deficiencies—what have been termed "automatic escalators"—and to vigorously implement such programs as the Balanced Technology Initiative (BTI), NATO Cooperative Research and Development, side-by-side testing which could lead to joint weapons procurement, and the conventional initiatives described as the NATO Defense Program.

The second track involves bold and innovative conventional arms control proposals, including a radical new approach to Confidence-Building Measures. With new thinking on both sides, the ability to ascertain possible Warsaw Pact war preparations could be significantly increased, and its options for a surprise attack could be reduced significantly. Innovative schemes for on-site access to militarily significant nodes in the Warsaw Pact's mobilization infrastructure—such as airfields, railroad yards, and even headquarters—should be the focus of this thinking. Pilot projects on verification could also be explored in parallel with negotiations on actual reductions and, if they are agreed upon, be split off and implemented in advance of any agreement on reductions, which may take years.

A third track involves reaffirming the commitment to NATO theater nuclear modernization. This is a continuing process, stemming from NATO's 1983 Montebello decision to reduce the European nuclear stockpile while taking steps to ensure that the remaining nuclear weapons are responsive, survivable and effective. Modernization programs, which enjoyed a high priority for NATO before the INF Treaty, are no less important for the post-INF period. In pursuing needed theater nuclear modernization programs, the Alliance must not undermine conventional capability, nor give the impression that a "nuclear quick fix" is the answer to NATO's conventional deficiencies. The goal is to raise the nuclear threshold in Europe, not to lower it.

The fourth track supports the other three through a vigorous education program by political leaders to gain and maintain the support of NATO publics for modern and effective conventional and theater nuclear forces and for a comprehensive arms control strategy. Such support will require frank assessments of the conventional and nuclear balance, and clear explanations of NATO's military needs and arms control rationale.

In summary, the INF Treaty, while succeeding in the removal of a number of nuclear weapons in the middle of NATO's deterrent spectrum, leaves a serious imbalance in conventional and theater nuclear forces on one side of this spectrum, and a strategic balance that is in rough parity on the other side. If the INF treaty is to prove beneficial to the security of the Alliance over the long run, NATO's challenges are clear:

—NATO must press forward with the kind of approach outlined above for establishing a stable, non-threatening balance of conventional forces in Europe.

—NATO must pay careful attention to the battlefield nuclear weapons area. The modernization of remaining battlefield and theater nuclear forces is a necessity, and must proceed in consultation with our allies.

—Efforts to achieve a stabilizing and effectively verifiable START agreement must be continued.

Lastly, future NATO summits must address a serious work-program designed to confront the hard realities of NATO's current military deficiencies.

The Alliance was certainly within its rights to celebrate the signing of the INF Treaty, but NATO's challenges remain formidable. What is needed now is to capitalize on the cohesion and solidarity that led to the INF Treaty in facing the imposing challenges that will confront the Alliance in the post-INF environment.

COMMITTEE ACTION

There is set forth below the Committee vote on March 28, 1988 on its report to the Senate entitled "NATO Defense and the INF Treaty."

In favor: Senators Nunn, Stennis, Exon, Levin, Kennedy, Bingaman, Dixon, Glenn, Gore, Wirth, Shelby, Warner, Thurmond, Cohen, Quayle, Wilson, Gramm, and McCain.

Opposed: Senators Humphrey and Symms.

Other rollcall votes which were considered during the course of the Committee deliberations will appear in the printed version of the report.

APPENDIX A

SENATE ARMED SERVICES COMMITTEE HEARINGS ON NATO DEFENSE AND THE INF TREATY

1. Strategy and capabilities for NATO defense, including the implications of the INF treaty

DATE: January 25, 1988 (morning and afternoon)
WITNESSES: The Honorable Frank C. Carlucci
Secretary of Defense

Admiral William J. Crowe, Jr., USN
Chairman, Joint Chiefs of Staff

2. Strategy and capabilities for NATO defense, including the implications of the INF treaty

DATE: January 26, 1988 (morning)
WITNESS: Dr. James R. Schlesinger
Former Secretary of Defense,
Secretary of Energy, and
Director of Central Intelligence

3. NATO-Warsaw Pact military balance, NATO military strategy, and NATO force improvements

DATE: January 27, 1988 (morning)
WITNESSES: Ambassador David M. Abshire
Former U.S. Permanent Representative to NATO

Mr. Phillip A. Karber
Vice President and General Manager for
National Security Programs
The BDM Corporation

4. NATO-Warsaw Pact military balance, NATO military strategy, and NATO force improvements

DATE: January 27, 1988 (afternoon)
WITNESSES: Senator Carl Levin
Chairman
Subcommittee on Conventional Forces and
Alliance Defense

Senator Dan Quayle
Ranking Minority Member
Subcommittee on Conventional Forces and
Alliance Defense

5. Strategy and capabilities for NATO defense, including the implications of the INF treaty

DATE: January 29, 1988 (morning)
WITNESS: Dr. Harold Brown
Former Secretary of Defense

6. Strategy and capabilities for NATO defense, including the implications of the INF treaty

DATE: January 29, 1988 (afternoon)
WITNESS: Ambassador Jeane J. Kirkpatrick
Former U.S. Representative to the United Nations

7. NATO-Warsaw Pact military balance, NATO military strategy, and NATO force improvements

DATE: February 1, 1988 (afternoon)
WITNESS: General Bernard W. Rogers, USA (Retired)
Former Commander in Chief
U.S. European Command

8. NATO-Warsaw Pact military balance, NATO military strategy, and NATO force improvements

DATE: February 2, 1988 (morning)
WITNESS: General John R. Galvin, USA
Commander in Chief
U.S. European Command

9. European perspectives on NATO's security posture, including the implications of the INF treaty

DATE: February 2, 1988 (afternoon)
WITNESS: Ambassador Richard R. Burt
U.S. Ambassador to the Federal Republic of Germany

10. NATO force deficiencies and improvements

DATE: February 3, 1988 (morning)
WITNESSES: General Carl E. Vuono, USA
Chief of Staff, U.S. Army

Admiral Carlisle A. H. Trost, USN
Chief of Naval Operations

General Alfred M. Gray, Jr., USMC
Commandant of the Marine Corps

General Larry D. Welch, USAF
Chief of Staff, U.S. Air Force

11. Intelligence Community's assessment of Treaty monitoring and verification capabilities (Executive Session of the Select Intelligence Committee to which Armed Services Committee Members were invited)

DATE: February 3, 1988 (afternoon)

12. NATO-Warsaw Pact military balance, NATO military strategy, and NATO force improvements

DATE: February 4, 1988 (morning)
WITNESS: Mr. Richard N. Perle
Former Assistant Secretary of Defense
for International Security Policy

13. NATO-Warsaw Pact military balance (Executive Session)

DATE: February 4, 1988 (afternoon)
WITNESSES: Mr. Andrew W. Marshall
Director, Office of Net Assessment
Office of the Secretary of Defense

Lieutenant Colonel Jeff S. McKitrick, USA
Military Assistant, Office of Net Assessment
Office of the Secretary of Defense

14. Allied perspectives on NATO's security posture, including the implications of the INF treaty

DATE: February 16, 1988 (morning)
WITNESSES: The Honorable Rozanne L. Ridgway
Assistant Secretary of State for
European and Canadian Affairs

Ambassador Ronald F. Lehman, II
Chief Negotiator on Strategic Nuclear Arms

Ambassador Edward L. Rowny
Special Advisor to the President and
Secretary of State for Arms Control Matters

15. Strategy and capabilities for NATO defense, with emphasis on European perspectives

DATE: February 16, 1988 (afternoon)
WITNESS: Dr. Zbigniew Brzezinski
Former Assistant to the President for
National Security Affairs

16. Meeting with Dr. Willem van Eekelen, Minister of Defense of the Kingdom of the Netherlands and Chairman of the Eurogroup Defense Ministers (Executive Session)

DATE: February 17, 1988 (morning)

17. Conventional arms control and confidence-building measures in Europe

DATE: February 17, 1988 (afternoon)
WITNESSES: Ambassador Robert D. Blackwill
Former Chief Negotiator and Head of the U.S. Delegation, Mutual and Balanced Force Reduction Negotiations

Professor Karl Kaiser
Director, Research Institute
German Council on Foreign Relations

Mr. Phillip A. Karber
Vice President and General Manager for National Security Programs
The BDM Corporation

18. Conventional arms control and confidence-building measures in Europe

DATE: February 18, 1988 (morning)
WITNESSES: Dr. James A. Thomson
Vice President
The RAND Corporation

Mr. Charles H. Thomas
Principal Deputy Assistant Secretary of State for European and Canadian Affairs and
U.S. Representative to NATO's High Level Task Force on Conventional Arms Control

19. Soviet incentives and intentions to comply with the INF treaty (Executive Session of the Select Intelligence Committee to which Armed Services Committee Members were invited)

DATE: February 18, 1988 (afternoon)

20. Implications of the INF treaty for negotiating the Strategic Arms Reductions Talks (START) Treaty (Joint Executive Session of the Armed Services Committee and Select Intelligence Committee)

DATE: February 19, 1988 (morning)

21. INF treaty

DATE: February 22, 1988 (afternoon)
WITNESS: Ambassador Maynard W. Glitman
Chief Negotiator on Intermediate-range Nuclear Forces

22. INF treaty

DATE: February 23, 1988 (morning)
WITNESS: Ambassador Maynard W. Glitman
Chief Negotiator on Intermediate-range Nuclear Forces

23. Implications of the INF treaty

DATE: February 24, 1988 (morning)
WITNESSES: Mr. Frank J. Gaffney, Jr.
Former Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy

Dr. William R. Van Cleave
University Professor and Director of the Center of Defense and Strategic Studies
Southwest Missouri State University

Ambassador Evan G. Galbraith
Former U.S. Ambassador to France

24. Strategy and capabilities for NATO defense, including the implications of the INF treaty

DATE: February 24, 1988 (afternoon)
WITNESS: Dr. Henry A. Kissinger
Former Secretary of State and
Assistant to the President for National Security Affairs

25. Resource policies for NATO force improvements

DATE: February 25, 1988 (morning)
WITNESSES: Ambassador Alton G. Keel, Jr.
U.S. Permanent Representative to NATO

Mr. Dennis Kloske
Special Advisor to the Deputy Secretary of Defense on NATO Armaments

26. Compliance with, and enforcement of, the INF treaty

DATE: February 25, 1988 (afternoon)
WITNESSES: Ambassador Paul H. Nitze
Ambassador at Large and Special Advisor to the President and Secretary of State on Arms Control Matters

Ambassador Maynard W. Glitman
Chief Negotiator on Intermediate-range Nuclear Forces

27. Assessment of the INF treaty's possible impact on the Special Access Programs of the Department of Defense (Executive Session)

DATE: March 2, 1988 (morning)
WITNESSES: Representatives from the Office of the Secretary of Defense and the Services

28. INF treaty, including issues related to the negotiating record (Executive Session)

DATE: March 18, 1988 (morning and afternoon)
WITNESSES: Ambassador Maynard W. Glitman
Chief Negotiator on Intermediate-range Nuclear Forces

Representatives from the Office of the Secretary of Defense and the Joint Staff

29. INF Treaty, including issues related to ground-launched cruise missiles as well as DoD Special Access Programs and "future" weapons systems (Executive Session)

DATE: March 24, 1988 (morning)

WITNESSES: The Honorable Ronald F. Lehman, II
Assistant Secretary of Defense for International Security Policy

General Robert T. Herres, USAF
Vice Chairman
Joint Chiefs of Staff

Ambassador John Woodworth
Deputy Chief Negotiator on Intermediate-range Nuclear Forces

APPENDIX B

SUMMARY OF THE INF TREATY

The INF Treaty eliminates all U.S. and Soviet ground-launched cruise and ballistic intermediate and shorter-range missile systems tested or deployed for weapons-delivery and permanently bans all systems of these types thereafter. Intermediate-range is defined as between 1000 and 5500 kilometers (600 and 3300 miles); shorter-range is defined as between 500 and 1000 kilometers (300 and 600 miles). The elimination of both deployed and non-deployed missiles and their launchers, as well as designated support structures and equipment for the missiles, is required. The Treaty does not, however, require destruction of the nuclear devices, guidance packages and certain other parts.

The U.S. missiles to be eliminated are the Pershing II, the BGM-109G GLCM and the Pershing 1A missile. All of these missiles carry a single warhead. The Soviet missiles slated for elimination are the SS-20, SS-4, SS-5, SS-12, SS-23, and SSC-X-4 GLCM. The SS-20 carries three warheads; the other Soviet missiles carry one warhead.

As listed in the November 1987 data exchange, the Parties have declared that the numbers of these missiles and launchers to be eliminated under the Treaty are as indicated below:

	Deployed	Non-deployed	Aggregate	RVs*
United States				
Intermediate-Range Systems				
Pershing II	120	127	247	247
GLCM	309	133	442	442
Total Missiles	429	260	689	689
Launchers	214	68	282	
Shorter-Range Systems				
Pershing IA missiles	0	170	170	170
Launchers	0	1	1	
Total missiles and RVs	429	430	859	859

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* Note: Warheads are removed, but not "eliminated." Numbers shown are those which would be associated with the missiles to be eliminated.

Soviet Union	Deployed	Non-deployed	Aggregate	RVs*
Intermediate-Range Systems				
SS-20	405	245	650	1950
SS-4	65	105	170	170
SS-5	0	6	6	6
SSC-X-4	0	84	84	84
Total missiles	470	440	910	2210
Launchers	484	124	608	
Shorter-Range Systems				
SS-23	167	33	200	200
SS-12	220	506	726	726
Total Missiles	387	539	926	926
Launchers	197	40	237	
Total Missiles and RVs	857	979	1836	3136

As indicated above, the Soviet Union will remove approximately four warheads now deployed on intermediate- and shorter-range missiles eliminated under the Treaty for each U.S. warhead removed (3136 versus 859). The ratio of Soviet missiles eliminated versus U.S. missiles eliminated is about two-to-one (1836 versus 859).

On the date the Treaty enters into force, each side must stop the production of all INF missiles, launchers and stages. Flight-testing must also cease. Two years and 341 days (that is, three years minus fifteen days) after the Treaty enters into force, the United States and Soviet Union must have completed the elimination of their intermediate-range and shorter-range missiles. During the remaining fifteen days in the three-year elimination period, the United States must withdraw to its territory any U.S. reentry vehicles for West German Pershing 1A missiles which the Federal Republic of Germany (FRG) releases from the existing Program of Cooperation (POC) between the two allies. Although it is not required by the Treaty, the FRG Government has pledged to dismantle its Pershing 1A missiles when the U.S. and Soviet elimination procedures have been completed and to terminate the POC on this system.

The elimination provisions require a periodic updating of the data base contained in the Memorandum of Understanding. Within 30 days of the date the Treaty enters into force, each side must provide revised information on all categories of data found in the Memorandum of Understanding (MOU). This revised submission will supercede the data contained in the November 1987 MOU. Although the United States will have on-site inspection rights at formerly declared INF sites and facilities, it will ultimately have to depend on national technical means to ascertain whether there are any discrepancies and/or omissions in the revised submission. Since national technical means may not be sufficient to this task, the United States may need to seek cooperation from the Soviet Union in clarifying questions which may arise in this context. Subsequent updates are to occur thirty days after the end of each six month period of the three year elimination process.

The key provisions governing the elimination of the undeployed intermediate-range missiles are as follows: within six months after the Treaty enters into force, each side must eliminate all types of intermediate-range (and shorter-range) missiles tested but never deployed. For the Soviet Union, this is the SSC-X-4 GLCM; for the United States, the Pershing 1B. Also within the first six months, each side may eliminate up to 100 of its intermediate-range missiles by launching them.

The first phase of reductions for intermediate-range missiles must be achieved 29 months after the treaty enters into force. In the first phase each side must have reduced its deployed launchers to a number capable of holding missiles carrying no more than 171 warheads and deployed missiles to the number capable of carrying no more than 180 warheads. Each side must also limit its nondeployed launchers and missiles so that the sum of the deployed and nondeployed launchers and missiles does not exceed that capable of carrying 200 warheads.

The provisions governing the elimination of shorter-range missiles require that within 90 days all deployed shorter-range missiles, and all deployed and nondeployed launchers, must be moved to specified elimination facilities; and within twelve months all nondeployed shorter-range missiles must be moved to elimination facilities. Finally, within eighteen months all shorter-range missiles, launchers, and specified support structures and equipment must be eliminated.

APPENDIX C

LETTERS FROM FORMER PRESIDENTS RICHARD NIXON, GERALD R, FORD, AND JIMMY CARTER

RICHARD NIXON

February 11, 1988

26 FEDERAL PLAZA
NEW YORK CITY

Dear Sam and John,

As you requested, I have put my views about the proposed Intermediate-Range Nuclear Forces Treaty in writing in the event you believe they may be of interest to your colleagues on the Armed Services Committee.

While I was not a proponent of the zero-zero formula it embodies, I believe the treaty should be ratified by the Senate. Since U.S. INF forces were a key element in the seamless web of nuclear deterrence linking the defense of Western Europe and the United States, I would have preferred a treaty that permitted each side to retain equal INF forces, though at sharply reduced levels of deployment. I expressed these reservations in an article I coauthored with Henry Kissinger on April 26, 1987. We also said that if the Administration did move forward with the zero-zero formula in Europe, it should insist on expanding the formula worldwide, thereby eliminating the 100 Soviet missiles in Asia, and on linking the final phase of INF reductions to substantial progress on negotiations to eliminate Soviet conventional superiority in Europe. Our negotiators succeeded in winning concessions on the first issue but failed to obtain agreement on the second.

The Senate can express its concern on this and other issues by following the precedent of the Jackson Amendment to the proposed SALT I Treaty in 1972, which required future arms control agreements to be based on parity. But the Senate should not add amendments that would require renegotiation of the treaty, since such an action would have a disastrous impact on our European allies.

In considering the treaty, the Senate should bear in mind these caveats:

First, the NATO alliance must take actions to compensate for the treaty. This means both increasing our bomber forces stationed in Europe capable of reaching Soviet territory and also modernizing NATO's short-range nuclear forces. Eliminating Soviet superiority in conventional weapons should have priority over reductions in nuclear weapons. Any strategic arms reduction agreement should be expressly linked to an agreement reducing the Soviet superiority in conventional arms.

Second, the United States must not allow the INF treaty to usher in a false euphoria about a new dawn in U.S.-Soviet relations. Arms control agreements do not produce peace. Wars are caused not by the existence of arms but by the failure to resolve political differences which lead to their use. As long as Moscow continues its expansionist policies in Asia, Latin America, and Africa, we must continue to support policies that will enable us to deter and compete with the Kremlin even as we negotiate with its leaders.

Third, the United States must not make the mistake of believing that the INF verification provisions, which are more intrusive than those in any previous agreement, would be adequate for a START accord. While serious concerns have been expressed in the hearings about the possibility of Soviet cheating under the INF treaty, the strategic impact of such cheating, while important, would not be cataclysmic. But if the United States fails to insist on genuinely ironclad verification provisions in a START agreement, the survival of the West could be at risk.

While the INF debate thus far has primarily centered on the issue of verification, that is not the central question in the START talks. We must keep in mind that the fact a bad agreement can be verified does not make it a good agreement. Our goal in the START talks must be not only an accord that is verifiable but also one that eliminates the present Soviet advantage in counterforce weapons. None of the current Administration proposals that have surfaced in the media meet that test.

With warm regards,

Sincerely,

Hon. John Warner
Hon. Sam Nunn

GERALD R. FORD

February 19, 1988

Dear Senators Nunn and Warner:

In response to your letter of February 10, 1988, on behalf of the United States Senate Committee on Armed Services, I am pleased to summarize my view on the Intermediate-range Nuclear Forces (INF) Treaty.

I support ratification of the Treaty by the United States Senate. However, it is essential that the members of the Senate are fully assured that the verification provisions are more than sufficient to provide the capability to detect any violations of the agreed terms. The U.S. must also have in being the technical capability of determining any such violations.

The Warsaw Pact conventional forces are generally recognized as superior to those of NATO. Without some modification in this current conventional arms relationship the four decades of peace in the European continent could be placed in jeopardy.

To remedy this imbalance between conventional forces of the Warsaw Pact and NATO I strongly recommend the following. The MBFR or other negotiations achieve an agreement that would reduce and equalize conventional forces on both sides. The MBFR negotiations in Vienna, which have gone on for about two decades, would be the best forum to correct the current Soviet/Warsaw Pact superiority.

However, If the MBFR or comparable negotiations are delayed or unsuccessful it is mandatory that NATO immediately implement actions that will sufficiently strengthen its conventional forces to offset Warsaw Pact superiority.

Most importantly, there should be no further reductions in European theatre nuclear weapons until the issue of balance in conventional arms is resolved.

Members of the U.S. Senate who vote for ratification of the INF Treaty must recognize their commitment to NATO's conventional arms improvements. It would be foolhardy to ratify an INF Treaty and not adequately achieve balance and strength in NATO's conventional capability. We must never forget NATO has been the military force in being that has maintained peace on the European continent for the longest period in the past 200 years.

If you and the other members of the Committee have further questions I will be glad to respond.

Sincerely,

Gerald R. Ford

Senator Sam Nunn and
Senator John W. Warner
United States Senate
Committee on Armed Services
Washington, D. C. 20510-6050

JIMMY CARTER

March 3, 1988

To Senators Sam Nunn and John Warner

In response to your letter of February 10, let me outline briefly my opinion about the recently signed Intermediate-range Nuclear Forces (INF) Treaty. I should make it clear that I have not been briefed on the negotiations or the classified details of the agreement.

I understand that the Treaty requires the United States and the Soviet Union to eliminate all their intermediate-range and shorter-range missile systems within three years and bans them thereafter. It also requires the two sides to put into force measures to facilitate effective verification of the terms of the Treaty. A Memorandum of Understanding on Data provides for the exchange of information concerning numbers, characteristics, and locations of missiles on each side. An Inspection Protocol sets forth procedures for on-site inspections and monitoring of compliance with the agreements. A separate Protocol prescribes procedures for the elimination of missiles, launchers, and support facilities, but not warheads or guidance mechanisms. (I understand that the warheads from the 72 Pershing 1As will be destroyed at the end of the three year dismantlement period.) It is my presumption that the terms set forth in these four principal documents either have been or will be carried out honestly and thoroughly by both sides, and that the means to detect violations are adequate.

Since the Soviets will be required to destroy 680 launchers and the United States 364, this is a favorable numerical balance for our nation. At the same time, however, the Soviets have been successful in reducing a substantial threat to the western portion of their own homeland and we will have much less deterrent capability in Europe to discourage any possible intrusion by Warsaw Pact forces into NATO territory.

I do not deplore this reduction in deterrent forces. In effect, the agreement is consistent with the decision made by NATO leaders in December 1979 to meet the Soviet SS-20 threat by deploying our own theater nuclear weapons. At that time, you will remember, the United States agreed to negotiate with the Soviet Union in order to eliminate these missiles on both sides. The deployment of Pershing missiles and ground launched cruise missiles has had the desired result.

There will now be some reduction in nuclear arsenals -- about three percent, I understand. If SALT II had been fully implemented, the Soviets would have had to dismantle about ten percent of their nuclear missiles, consisting primarily of older armaments. Any such reduction is at least symbolically important in that it sends a signal to anxious people around the world that the superpowers are serious in their efforts and can cooperate at least in a limited fashion in nuclear arms control. The INF Treaty does not make any significant change in the strategic military balance. One result is that the removal of intermediate-range and short-range missiles will highlight the Soviet advantage in conventional forces.

Treaty provisions governing communication and verification can enhance crisis stability through the use of nuclear risk reduction centers. Also, new on-site inspection rights during the next thirteen years can reduce tension between the United States and the Soviet Union by adding substantially to mutual understanding of procedures, policies, and attitudes. It remains to be seen whether ground inspections without aerial inspections will be adequate. (Future agreements involving conventional forces will almost certainly require aerial inspections.) Unnecessary delays in issuing visas, providing inadequate transportation, communication, and requested measurements and photographs, or otherwise inhibiting thorough on-site inspections could be a problem. Again, however, the acceptance of such inspections is a significant advance that bodes well for possible future agreements involving strategic nuclear weapons and conventional military forces.

Looking to the future, any further substantial reductions in nuclear forces should be tied to equalizing the conventional military balance in Europe, and special attention must be paid to the presence of the large Soviet land-based missiles that pose a major threat to strategic stability. In addition to reducing total nuclear arsenals, the warhead:launcher ratio needs to be lowered and remaining launchers should be deployed in relatively invulnerable sites to remove any possible advantage from a pre-emptive strike.

In summary, my recommendation to the members of the U.S. Senate is that the INF Treaty be ratified despite its limitations. Rejection of the Treaty or substantive amendments or reservations that would require further negotiation would, at this time, be a serious blow to our nation's prestige and an almost insurmountable obstacle in pursuing more substantive agreements in the future.

Sincerely,

Jimmy Carter

The Honorable Sam Nunn
The Honorable John Warner
United States Senate
Washington, D.C. 20510

ADDITIONAL VIEWS OF MR. WIRTH

We find ourselves in one of those rare historical situations when circumstances converge to permit significant progress in arms control and reductions. The economies of the East are failing. Increasingly, the Soviets and their allies recognize the need to redirect resources from defense to domestic priorities. Soviet political scientists and military leaders are debating the need to maintain large offensively-organized armies in Eastern Europe as they wrestle with the needs of their domestic economy. Although it is premature to conclude that this talk of "reasonable sufficiency" will pave the way to serious conventional arms reduction proposals by the Soviets, the debate bears close watching.

However, conventional arms control and reduction talks, when they begin, will probably move slowly. Rapid movement in the talks or dramatic breakthroughs leading to the mutual redeployment or reduction of forces facing each other along the East-West border appear unlikely. There is, however, an area that offers promise for immediate progress: confidence- and security-building measures. The Committee's formal report to the Foreign Relations Committee on the INF Treaty recognizes the promise of such measures, identifying them collectively as components of the "second track" of the "roadmap" to NATO strength in the report's section on "NATO in the Post-INF Environment."

Within the context of the new round of talks anticipated to begin later this year under the auspices of the Conference on Security and Cooperation in Europe (CSCE), we should press for an expansion of the Confidence- and Security-Building Measures (CSBM's) agreed to at Stockholm in 1986 and the intrusive verification measures contained in the INF Treaty.

The provisions of the Stockholm Agreement, which permit each side to observe and inspect military operations of the other side, are viewed with great promise in Europe. They are little recognized or understood in the United States. There are many areas where the existing agreements can be expanded. We should seek to increase the number of inspections permitted annually, and we should consider expanding the scope of activities subject to inspection and observation. For example, all military operations including amphibious exercises, movements of aviation units, and naval maneuvers should be brought under the provisions of the Stockholm Agreement.

Building on the intrusive inspection regime of the INF Treaty, we should seek to establish on-site monitoring facilities at the entrances to major rail yards, ammunition and fuel storage depots, and international transshipment points. Such a system would provide signatories with indications of increased activities in and around these locations which could signal mobilization or deployment and trigger a demand for physical inspection.

Another confidence-building area which we should pursue immediately is the exchange of NATO and Warsaw Pact officers for the purposes of discussing strategy and doctrine and breaking down barriers to better understanding between the competing alliances. An ultimate goal of such an exchange program would be the achievement of a mutual shift from offensive to defensive postures by the alliances. Like CSBM's, this concept has received some attention in Europe, but as yet has not been the focus of much analysis in the United States. it is apparent that changes in U.S. doctrine—such as moving from active defense to AirLand Battle—are a matter of grave concern to the Soviets and their allies. Warsaw Pact military officers I met in Poland saw AirLand and NATO's Follow-on Forces Attack (FOFA) doctrine as offensive in nature and intimidating. Both sides proclaim themselves to be defensive alliances, yet each is forward deployed and perceives the other to be offensively postured.

It is important that NATO and the Warsaw Pact work to understand each other's strategy, that they work to develop and agree upon a regime of indicators which would discriminate routine activity from pre-mobilization and mobilization activities, and that we use CSBM's to verify these indicators. Ultimately we can use the exchange of information on strategy and doctrine as an avenue to reduce border tension.

A beginning along this path toward meetings between senior NATO and Warsaw Pact officers has already begun. Secretary of Defense Frank Carlucci and Soviet Defense Minister Dmitri Yazov's recent meeting will be followed by an exchange of visits between Admiral William J. Crowe and his Soviet counterpart Marshal Sergei Akhromeyev. We should seek to make these meetings routine. Furthermore, they should be conducted at all levels of both nations' defense establishments. Senior U.S. and NATO commanders should meet regularly with their Soviet and Warsaw Pact counterparts; commanders and staff of intermediate units should also exchange visits, as should faculties of our major war colleges. All of these measures would reduce tension and the possibility for misunderstanding and misinterpretation of the other side's activities.

Exchange between NATO and Warsaw Pact officers and an expanded regimen of CSBM's need not wait for tangible reductions or redeployment of conventional forces. The independent establishment and use of CSBM's can, in fact, facilitate progress toward arms reduction agreements and serve as a basis for the verification regime for those reductions when they occur. These CSBM's, or "operational arms control" measures (to be differentiated from "structural arms control" measures which actually eliminate weapons or forces), can create the climate for eventual progress on that more difficult front even as they reduce tensions and the possibility of accidental hostilities. They are deserving of immediate and intensive attention by the United States and NATO.

D. Administration Comments on Senate Armed Services Report

THE COUNSELOR
DEPARTMENT OF STATE
WASHINGTON

April 14, 1988

UNCLASSIFIED WITH SECRET ATTACHMENT

Dear Senator Pell:

At the March 30 meeting of the Foreign Relations Committee, Senator Helms asked the Administration to provide a written response to the five areas of concern to the Armed Services Committee, which Senator Nunn and Senator Warner had identified during their presentation to your Committee on March 28. I am pleased to provide that response.

Article XIV

The first issue relates to the effect of Article XIV on U.S.-NATO defense cooperation. Article XIV is not a noncircumvention provision. Article XIV will not affect existing patterns of defense cooperation or collaboration with our Allies. Nor will this provision preclude cooperation with our Allies in modernization. The Treaty prohibits us from producing or transferring a missile, missile stage or launcher for a Treaty-limited GLCM or GLBM. The Treaty does not prohibit the production or transfer of lesser components, technology, or blueprints, and the United States rejected Soviet proposals for such prohibitions. In any event, each such issue would have to be dealt with on a case-by-case basis, taking into account the obligation to comply in good faith with the Treaty.

I would also note that the report of the Armed Services Committee highlighted Ambassador Glitman's detailed explanation of the negotiating history on this issue. That report stated, *inter alia*, that the Ambassador's testimony "demonstrated that the Soviets had sought to insert language into the Treaty which they hoped would restrict US-NATO cooperation, but the U.S. specifically resisted this effort, and the U.S. view was agreed by the Parties."

The Honorable
Claiborne Pell,
Chairman,
Committee on Foreign Relations,
United States Senate.

Conventionally-Armed GLCMs

The second issue mentioned by Senators Nunn and Warner was the question of whether the Treaty should ban conventionally-armed ground-launched cruise missiles (GLCMs) in the INF range. The USG decision to ban these missiles took into account a number of considerations. It is important to remember what the issue was not about. It was not about whether to permit planned U.S. deployments of conventionally-armed GLCMs; nor was it about whether to withdraw from Europe previously deployed systems. Rather, the decision to be made was whether or not to protect the option for deploying conventionally-armed GLCMs. At the time of the decision, the U.S. and NATO did not -- and do not today -- have any specific plans or military requirements for conventionally-armed GLCMs in the INF range.

Moreover, the USG has fully protected its right to deploy INF range conventional air- and sea- launched cruise missiles. Such systems are not covered by the INF Treaty, and our position in START is that there shall be no limits on conventionally-armed cruise missiles. The INF Treaty also does not cover GLCMs with ranges below 500 kilometers.

Allowing Soviet deployment of conventional GLCMs could have exacerbated the existing conventional imbalance (and added to Soviet ability to deliver chemical weapons), especially given the possibility that the Soviets would deploy these systems in far greater numbers than NATO. Any deployment by NATO of additional land-based intermediate-range missiles in Europe would, in the current political climate, be a complicated task.

In addition to these reasons, we also had to consider the verification difficulties inherent in distinguishing between nuclear- and conventionally-armed GLCMs. The USG has been unable to develop -- and the Soviet Union has not put forth -- a regime to verify effectively the differences between the two types. Thus, in the context of the INF Treaty, by permitting Soviet conventionally-armed GLCMs, we would have to assume for military planning purposes that the entire force was capable of delivering nuclear weapons.

By banning all GLCMs of INF range, and requiring the elimination of all existing INF GLCM missiles and launchers, we make covert Soviet deployment of INF-range GLCMs more difficult and costly. Moreover, without flight-testing, crew training and exercising of equipment, the operational capability of any covertly stored GLCMs would be seriously degraded over time. Conversely, the Soviet ability to maintain an operational nuclear GLCM capability under the guise of a permitted conventionally-armed GLCM program would be high and would provide the Soviets a ready means of breaking out from the Treaty.

Thus, the decision to ban conventionally-armed GLCMs reflected a considered USG judgment based on a number of factors including a military analysis.

SS-25/SS-20 Second Stage Correlation (Article VI, Paragraph 2)

The third issue relates to the meaning of Article VI, para 2. Article VI of the INF Treaty reads as follows:

"1. Upon entry into force of this Treaty and thereafter, neither Party shall:

> (a) produce or flight test any intermediate-range missiles or produce any stages of such missiles or any launchers of such missiles; or
>
> (b) produce, flight-test or launch any shorter-range missiles or produce any stages of such missiles or any launchers of such missiles.

2. Notwithstanding paragraph 1 of this Article, each Party shall have the right to produce a type of GLBM not limited by this Treaty which uses a stage which is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range GLBM having more than one stage, providing that that Party does not produce any other stage which is outwardly similar to, but not interchangeable with, any other stage of an existing type of intermediate-range GLBM."

Paragraph 1 of Article VI sets forth, inter alia, a basic prohibition on the production of any intermediate-range ground-launched missile or any stages of such missiles. Paragraph 2 was incorporated into this Article to take into account the outward physical similarity between the first stage of the SS-25 ICBM (which the Soviets wish to continue to produce) and the first stage of the SS-20, which is an existing type of intermediate-range ground-launched ballistic missile and whose production, including its first stage, is prohibited by Paragraph 1. The purpose and effect of Paragraph 2 is to make clear the agreement of the Parties that the Treaty does not prohibit the Soviets from continuing to produce the SS-25 ICBM on the basis that it has a first stage outwardly similar to, but not interchangeable with the first stage of the SS-20. Hence, Paragraph 2 of Article VI provides that, nothwithstanding the Paragraph 1 prohibition against producing stages of intermediate-range ground-launched ballistic missiles, each Party has the right to produce a type of ground-launched ballistic missile not limited by the Treaty (e.g. the SS-25 in the Soviet case) even if that missile uses one stage that is outwardly similar to, but not interchangeable with, a stage of an existing type of intermediate-range ground-launched ballistic missile (the SS-20 in the Soviet case) having more than one stage.

In addition, however, Paragraph 2 of Article VI permits the Soviet Union to produce and possess the first stage of the SS-25 only provided that no other stage of that missile is outwardly similar to, but not interchangeable with, any other stage of an existing type of intermediate-range ground-launched ballistic missile (e.g., the second stage of the SS-20). The word "notwithstanding" serves to underscore the important distinction between the effects of the prohibition contained in Paragraph 1 and the effect of that as qualified in Paragraph 2.

By using parallel grammatical construction (e.g., by repeating the phrase "outwardly similar to, but not interchangeable with" in connection with both stages), paragraph 2 makes clear that precisely what is permitted in the case of the first stage is prohibited in the case of the second stage. In addition, the fact that this phrase is repeated verbatim shows that it should be read as a whole and not broken down into component grammatical parts.

We and the Soviets agreed that this provision would prohibit them from building a second stage of the SS-25 which is "outwardly similar to, but not interchangeable with" the second stage of the SS-20. Furthermore, a stage which is outwardly similar to and interchangeable with an SS-20 stage would be a violation of Article VI, paragraph 1.

Thus, Article VI, Paragraph 2 of the INF Treaty permits the Soviets to produce the SS-25 first stage even though it is "outwardly similar to, but not interchangeable with" the SS-20 first stage. It also limits the Soviets to producing only one stage which is "outwardly similar to, but not interchangeable with" a stage of an existing type of intermediate-range GLBM (i.e., the first stage of the SS-20). Thus, while the Soviets can produce the SS-25 first stage which is "outwardly similar to, but not interchangeable with" the first stage of an SS-20, they cannot produce a stage which is "outwardly similar to, but not interchangeable with" the SS-20 second stage.

Article VI, Paragraph 2 of the INF Treaty gives the U.S. the same right as the USSR to produce a stage, for a non-Treaty-limited missile, which is "outwardly similar to, but not interchangeable with" a stage of an existing type of intermediate-range missile (i.e., the Pershing II). We would not, however, be permitted to produce another stage for a non-Treaty-limited missile which is "outwardly similar to, but not interchangeable with" a stage of an existing type of intermediate-range missile. Thus, if we were to produce a short-range missile using a stage which is "outwardly similar to, but not interchangeable with" the second stage of the Pershing II missile, we would then be prohibited from producing a non-Treaty-limited missile using a stage which is "outwardly similar to, but not interchangeable with" the first stage of the Pershing II.

Definition of Range of an INF Ballistic Missile

The fourth issue raised by Senator Nunn relates to the Administration's statements that under the INF Treaty the Soviet Union would not be prohibited from developing a new missile, testing it only once at a range above 5500 kms but then conducting all subsequent tests at INF range. The fundamental rule is that a system which, by even a single test over 5500 kms, has demonstrated that it has strategic range capability will be considered to be strategic and not banned by the INF Treaty. However, this range capability rule in no way prejudices our right to challenge Soviet compliance, if a system which had been tested once to 5500 kms was being tested in a different configuration at INF ranges. We do not want to be specific on the factors that would be taken into consideration in making such a determination. In any event, any U.S. challenge would be undertaken on a case-by-case basis. Any system tested only to INF ranges, of course, would be prohibited. Nevertheless, the basic rule remains that a system tested once to strategic range will be considered to be strategic and not covered by the INF Treaty.

Futuristic Weapons Systems

The fifth issue raised by Senator Nunn relates to the definition of weapon delivery vehicle and the possible use of future technologies in connection with INF missile systems. The INF negotiating record, viewed in conjunction with the Treaty text and with customary international law and the Vienna Convention on the Law of Treaties, demonstrates that the United States and the Soviet Union share a common understanding that all U.S. or Soviet ground-launched missiles with ranges between 500-5500 kilometers, both present and future, should be subject to the provisions of the INF Treaty. (See attached classified extract from the negotiating record.)

During the INF negotiations, the United States and the Soviet Union did not specifically discuss INF ballistic and cruise missiles using future technologies, such as lasers, to destroy targets; nor did the Parties specifically address the meaning of the term "weapon delivery vehicle". Instead, the Parties recognized that it was unnecessary to define in the Treaty terms which had ordinary, commonly understood meanings or where the common sense meaning of the term was intended by the Treaty. Indeed, Article 31 of the Vienna Convention on the Law of Treaties (which the U.S. recognizes as largely reflecting customary international law) provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context ..."

In the context of the INF Treaty, it is our considered judgment that the Parties understand the term "weapon-delivery vehicle" to mean any INF ballistic or cruise missile system that is tested or deployed to carry a weapon -- that is, any mechanism or device which when directed against a target is designed to damage or destroy it. Accordingly, it is not necessary to confirm this understanding with the Soviet Union as a condition to the Senate's giving its advice and consent to ratification of the INF Treaty.

The use of new weapons technologies would not be prohibited in a delivery vehicle not covered by the Treaty.

Finally the statement in the Article-by-Article analysis that GLBMs (or GLCMs) "that have been flight tested or deployed for weapons delivery, i.e., flight tested or deployed with any type of warhead device or simulation thereof" should not be read as excluding non-explosive devices from coverage by the Treaty. Rather, it should be read as clarifying that GLBMs and GLCMs which carry warhead simulators would be covered by the Treaty's ban.

Sincerely,

Max M. Kampelman
Counselor of the Department

Attachment:
As stated.